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No. 10-396

In The

Supreme Court of the United States

BOARD OF DIRECTORS, THE TRUCKEE-CARSON IRRIGATION DISTRICT & TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioners,

v.

UNITED STATES OF AMERICA & PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. VAN ZANDT
Counsel of Record for Petitioners
THEODORE A. KOLB
NEIL R. BARDACK
HANSON BRIDGETT LLP
425 Market Street, 26th Floor
San Francisco, CA 94105
(415) 777-3200
MVanZandt@hansonbridgett.com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Congress violates the separation of powers doctrine under Article III of the United States Constitution by enacting retroactive legislation that requires a court to accept a past federal regulation as currently valid, enforceable and immune from judicial challenge, the underlying premise of which was previously found by an all-inclusive federal water rights adjudication proceeding as violating vested water rights confirmed under a final federal district court water decree and judgment.

2. Whether a federal court has either the legal or equitable jurisdiction to make an award of prejudgment or postjudgment in-kind interest, that is, interest that is payable in property, in this case water as interest, and not money.

PARTIES TO THE PROCEEDING

Petitioners are the Board of Directors, Truckee-Carson Irrigation District and the Truckee-Carson Irrigation District. Respondents are the United States of America and the Pyramid Lake Paiute Tribe of Indians.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or nonwholly owned subsidiaries.

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OPINIONS BELOW

The memorandum decision dated December 3, 2003 (*infra* App. 30-59.) and Judgment of the United States District Court District of Nevada dated February 16, 2005 (*infra* App. 1-29.) are unreported. The Opinion of the United States Court of Appeals for the Ninth Circuit, dated April 20, 2010 (*infra* App. 1-29.) is reported in 602 F.3d 1074. The Ninth Circuit's order denying TCID's petition for panel hearing and petition for rehearing en banc is dated June 22, 2010 and is unpublished (*infra* App. 72-79.) And, that Court issued its mandate on June 30, 2010 (*infra* App. 61-65.)

JURISDICTION

The court of appeals' opinion was issued and entered on April 20, 2010. A timely petition for panel rehearing and rehearing en banc was denied on June 22, 2010 (*infra* App. 72-79.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Article III, § 1.

Truckee-Carson Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3294, Nov. 16, 1990.

28 U.S.C. § 1961.

Petitioners, the Board of Directors, Truckee-Carson Irrigation District and the Truckee-Carson Irrigation District, pray that the Supreme Court grant a writ of certiorari to review the judgment of the court below.

STATEMENT OF THE CASE

In 1902, Congress passed the Reclamation Act, 43 U.S.C. §§ 372 *et seq.* and the Secretary of Interior withdrew approximately 200,000 acres from public domain in western Nevada to form the Newlands Reclamation Project ("Project"), the first federal reclamation project authorized by Congress and the first ever built. Since 1926, the Truckee-Carson Irrigation District ("TCID") has operated and managed the Project for the United States under contract and on a quasi-contractual basis. TCID continues to do so today.

The Truckee River and the Carson River are the primary sources of water for the Project and are the lifeblood of the Project farmers who live and work the land as contemplated by Congress. Their water rights to these sources were litigated in two all inclusive water rights adjudications resulting in the Final *Orr Ditch* Decree in 1944 ("*Orr Ditch*"), which determined vested water rights to the Truckee River and the *Alpine* Decree in 1980, which determined vested

water rights to the Carson River.[1] Both of these federal court decrees are final.

In 1970, the Pyramid Lake Paiute Tribe of Indians ("Tribe") initiated a lawsuit attacking the 1967 iteration of regulations promulgated by the Secretary of the Interior ("Secretary") entitled Newlands Project Operating Criteria and Procedures ("OCAP"), which had been issued by the Secretary year to year since 1967, to control water taken into the Project. See 43 C.F.R. § 418 (1972).

The Tribe's challenge resulted in the decision of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) ("*Tribe v. Morton*"). The *Tribe v. Morton* court found that the *Orr Ditch* Decree and the 1950 Temporary Restraining Order ("TRO") in the *Alpine* Decree court governed the amounts and conditions under which water was available to the Project farmers, setting water duties at 3.5 and 4.5 acre feet per acre ("afa") for waters diverted from the Truckee River and 2.92 afa for waters diverted from the Carson River. The *Tribe v. Morton* court acknowledged that neither the Secretary of Interior, nor a court could set a regulation that would infringe upon vested water rights confirmed in these decrees.

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[1] A concise history of the litigation over water rights on the Truckee and Carson Rivers and the two relevant final water decrees governing these rivers can be found in *Nevada v. United States*, 463 U.S. 110 (1983) and *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp 877 (D.Nev. 1980) (affirmed as modified in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983)).

However, the *Tribe v. Morton* court found that the Secretary's 1967 OCAP ignored the lower water duty of 2.92 afa set in the *Alpine* TRO, and erroneously based the OCAP on the higher *Orr Ditch* Decree water duties of 3.5 and 4.5 afa. The *Alpine* Decree Court and the Ninth Circuit Court of Appeals ultimately found that the 2.92 afa temporary water duty set in the *Alpine* TRO, and which had been adopted by *Tribe v. Morton* and embodied in the 1973 OCAP, violated those vested water rights and the principle of beneficial use under Reclamation law and Nevada law.[2] *United States v. Alpine Land and Reservoir Co.* 503 F.Supp. at 888; 43 U.S.C. § 372; Nev. Rev. Stat. 533.035 (1913).[3]

The *Tribe v. Morton* court directed the Secretary to take both decrees into account in formulating a new OCAP for the water year ending October 31, 1973 consistent with that court's findings and order ("1973 OCAP"). In 1976, the United States Bureau of Reclamation ("BOR") calculated that under *Tribe v.*

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[2] Beneficial use is implemented through the water duty. Water duty "is that measure of water, which by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon. *United States v. Alpine Land and Reservoir Co., et al.*, 697 F.2d 851, 854 (9th Cir. 1983).

[3] "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right." 43 U.S.C. § 372.

Morton, the 1973 OCAP maximum allowable diversion of water would only permit the irrigation of approximately 47,000 acres in the Project, when over 73,000 acres were under contract with the BOR and historically up to 65,000 acres were actually irrigated each year. See *Nevada v. United States*, 463 U.S. 110, 117, n. 3 (1983). The 1973 OCAP remained unchanged until 1985, five years after entry of the final *Alpine* Decree in 1980.[4]

In 1980, the *Alpine* court issued a final order settling water rights to the Carson River in *Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), affirmed as modified in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983). ("*Alpine* Decree"). The *Alpine* Decree conclusively determined that the vested water rights of the Project farmers were historically the same as those guaranteed under *Orr Ditch* Decree, namely 3.5 afa for bottom lands and 4.5 afa for bench lands, based upon evidence presented at trial of historical usage since 1969. The 2.92 afa water duty in the *Alpine* Court's TRO, that was adopted in the 1973 OCAP under *Tribe v. Morton*, was vacated in the final *Alpine* Decree as not historically reflecting the actual water usage during the ten year period immediately preceding the issuance of the decree. *Alpine Land and Reservoir Co.*, 503 F.Supp. at 888. However, the Secretary did not

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[4] The Secretary of Interior did not promulgate any new OCAPs from 1981 to 1983. A 1984 Interim OCAP was invalidated by the District Court in Washington, D.C.

conform the OCAP to the *Alpine* Decree's water duties until 1985.

Three years after the *Alpine* Decree was issued, this Court unanimously decided its historic decision in *Nevada v. United States,* 463 U.S. 110 (1983). That case determined that the water duties confirmed under *Orr Ditch* for the farmers in the Newlands Project were vested in the Project farmers and that the United States owned only bare legal title to the water rights as the United States' role was that of a mere carrier of the water. *Id.* at 123; see also *Ickes v. Fox,* 300 U.S. 82, 94-96 (1937). Importantly, this Court held that both the government and the Tribe were bound by the doctrine of res judicata to the findings of *Orr Ditch* and the United States could not reallocate water away from the Newlands Project farmers to the Tribe. *Nevada*, 463 U.S. at 129-45.

In 1990, Congress enacted the Truckee-Carson Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3294 enacted Nov. 16, 1990 ("Settlement Act").

Pertinent to this Petition are the provisions of the Settlement Act in Section 209(j)(1)-(3) under which:

(1) in Sec. 209(j)(1) Congress directed the Secretary, when carrying out the Settlement Act's provisions, . . . to "act in a manner that is fully consistent" with the decision in *Tribe v. Morton*;

(2) in Sec. 209(j)(2) by fiat, reinstated all prior actions of the Secretary under any OCAP, whether they violated any existing decrees, including the final *Alpine* Decree. They were "declared to be valid and shall not be subject to review in any judicial or administrative proceeding";[5] and,

(3) in Sec. 209(j)(3), Congress directed the Secretary to recover in a court action for recoupment, water diverted in violation of such prior OCAP.[6]

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[5] Section 210(b)(13) exempted from the title's reach, the power of the *Orr Ditch* or *Alpine* courts to ensure that vested water rights holders, including Project farmers, were protected.

[6] The relevant provisions read in part:

(j) OPERATING CRITERIA AND PROCEDURES.

(1) In carrying out the provision of this title, the Secretary shall act in a manner that is fully consistent with the decision in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C.1973).

(2) . . . All actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid and shall not be subject to review in any judicial or administrative proceeding, except as set forth in paragraph (3) of this subsection.

(3) The Secretary shall henceforth ensure compliance with all of the provisions of the operating criteria and procedures referenced in paragraph (2) of this subsection or any applicable provision of any other operating criteria or procedures for the Newlands Project previously adopted by the Secretary, and shall, pursuant to subsection 709(h) or judicial proceeding, pursue recoupment of any water diverted from the

(Continued on following page)

The United States and the Tribe as Intervenors brought a class action lawsuit for recoupment of water in kind under section 209(j)(3), in the United States District Court, District of Nevada, *United States of America v. Board of Directors, Truckee-Carson Irrigation District, et al.*, CV-N-95-0757-HDM, thus forgoing any claim for monetary damages.[7] The case was filed against the Board of Directors for TCID, TCID itself as manager of the Project, and the class of some 3000 individual Project farmers, asserting a claim to recoup 1,057,000 acre feet (af) of water alleged to have been diverted from the Truckee River in excess of amounts allowed under the 1973 OCAP between 1973 and 1988.

After a trial without jury, the District Court found that the Settlement Act invoked the court's full equitable powers to fashion a remedy and entered judgment against TCID ordering it to repay 197,152 af of water to the United States and the Tribe for diversions of water over the 2.92 af water duty

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Truckee River in excess of the amounts permitted by any such operating criteria and procedures.

[7] The Settlement Act's authorization to the United States to recoup water did not preclude the United States from instead seeking monetary damages, as opposed to any other party, including the Tribe, who if they brought an action after December 31, 1997, were limited to seeking a declaratory judgment and injunctive relief to recover water. (Section 209(j)(3)).

allowed under the 1973 OCAP and *Tribe v. Morton*, as directed by the Settlement Act.[8]

The judgment was against TCID only and not the individual Project farmers, as the District Court recognized their rights were vested under the *Orr Ditch* and *Alpine* Decrees and protected by the Settlement Act, section 210(b)(13). The District Court's Decision and Judgment did not include an award of postjudgment interest. The District Court then modified its Judgment to require repayment of the judgment awarded to the Government and the Tribe, in equal yearly installments of 9857.6 af, and water interest at two percent per year on the unpaid balance of the judgment. The District Court had denied awarding water as pre-judgment interest, not because a federal court lacked the jurisdiction or federal precedent to make the award, but because of the United States' act of destroying documents during the litigation and for delaying the initiation of the litigation for some 22 years.

The Ninth Circuit Court of Appeals panel's opinion recognized that the Settlement Act could not be interpreted or enforced in any manner that would conflict with the vested water rights granted under the Final *Orr Ditch* and *Alpine* Decrees. Settlement

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[8] The District Court denied recovery for diversions between 1981 and 1984, as the Secretary did not promulgate any effective OCAPs and did not properly reflect the water duties in the final *Alpine* Decree.

Act § 210(b)(13). The Ninth Circuit upheld, without analysis however, the provisions of the Settlement Act's Section 209(j)(1)-(3) that retroactively required courts to adhere to *Tribe v. Morton* and the 1973 OCAP, despite the *Alpine* Decree which superseded the findings in *Tribe v. Morton* and the 1973 OCAP, and forbade judicial scrutiny of any prior actions of the Secretary under the prior 1973 OCAP.

The Ninth Circuit remanded with instructions that the District Court reconsider its decisions concerning pre-judgment and postjudgment water interest in the following respects. The District Court was directed to yet again reconsider whether a post-judgment water interest award could be factually supported and made in equity, in light of this Court's original jurisdiction decision in *Texas v. New Mexico,* 482 U.S. 124, 132, n.8 (1987). The opinion acknowledged that the award was unprecedented in federal jurisprudence, but believed that an award of water interest could be made by a federal court sitting in equity. Further, the District Court was directed to explain how it determined the two percent interest rate applied to the unpaid portions of the judgment.[9]

The Ninth Circuit also remanded the question of an award of pre-judgment interest for further

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[9] Under 28 U.S.C. § 1961(a) interest on a money judgment is calculated at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of the judgment.

consideration, overturning the district court's refusal to make an award of water interest because of a discovery dispute and the Government's delay in bringing suit. Recognizing that pre-judgment interest awards are not controlled by statute but rest in the discretion of the trial judge, the Ninth Circuit concluded that if postjudgment water interest could be awarded so could an award of pre-judgment interest, based upon common law equitable concepts of the need to fully compensate a party.

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. The Ninth Circuit Failed to Redress the Settlement Act's Blatant Violation of the Separation of Powers Doctrine.

This case raises two important concerns about the limits of Congressional power under Article III. First, Congress offended the separation of powers doctrine when it enacted legislation in 1990 that retroactively reinstated the 1973 OCAP, regulations the Secretary had in effect in the years 1973 to 1980, after those regulations had been judicially determined to have violated the applicable water duties adjudicated in the final *Alpine* Decree. The Congressional direction to the Secretary and to the federal courts was an act of Congress specifically overruling a final decision of the federal judiciary and Congressional nullification of a final federal judicial decree. This Congressional act violates U.S. Supreme Court

precedent on this issue as pronounced in *Plaut v. Spendthrift Farm, Inc., et al.*, 514 U.S. 211 (1995).

Second, Congress invaded the province constitutionally reserved for the Judiciary since *Marbury v. Madison* when it sought under the Settlement Act, to prohibit a court from interpreting or hearing any challenges to the Secretary's regulations in any court action. This extends to the recoupment action where the Congress directed the Secretary to bring redress to violations of the prior OCAPs, now undermined by a federal court decree and judgment.

In the Settlement Act, the Congress violated the separation of powers between the legislative and judicial branches. In the Settlement Act, Congress both overrides a final judicial decision and suspends the normal judicial power to interpret and rule on issues under the law. The Ninth Circuit's deference to the Congress' transgression of the Judiciary is an abdication of its Article III duty to interpret the Settlement Act. Nothing in the opinion reveals that court's own independent efforts to determine the limits of Congressional authority to trammel on judicial authority when Congress statutorily determined in advance the outcome of litigation authorized in the Settlement Act.

The Settlement Act is an unconstitutional attempt by special legislation to undo what federal courts accomplished in two all-inclusive final water rights adjudications, the results of which were unpalatable to special interests, the United States and the Tribe.

2. The Decision of the Ninth Circuit Unless Reversed May Serve as Precedent for Federal Courts to Fashion Awards of Non-monetary Interest In Excess of Their Jurisdiction.

The Court of Appeals committed reversible error by not determining as a matter of law, that a federal court has no jurisdiction to award property, here water, as postjudgment interest on a judgment. The Ninth Circuit failed to recognize that this Court's decisions in *Pierce v. United States*, 255 U.S. 398, 406 (1921) and *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992) obligates a federal court to apply 28 U.S.C. § 1961, requiring an award of postjudgment monetary interest on a monetary judgment, even in equity.

The Ninth Circuit erroneously relied on this Court's original jurisdiction decision in *Texas v. New Mexico*, 482 U.S. 124, 132, n.8 (1987), as precedent for a federal court to make an award of non-monetary postjudgment water interest in equity. The Ninth Circuit's remand with instructions to the District Court would cause that court to exceed its jurisdiction under the Federal Rules, in order to consider whether there was any factual basis to make an award of postjudgment water interest, even as part of a federal court's equitable powers.

The Ninth Circuit also erred when it directed the District Court, despite the lack of federal common law precedent, to consider an award of water as pre-judgment interest by using the analogue of

compensation for the lost value of money, to base such an award. The Court of Appeals wrongly assumed that an interest rate applicable to a money interest award could also be used to measure a non-monetary interest award.

The Ninth Circuit's opinion below is unprecedented and presents issues of first impression. If allowed to stand, it would invite mischief of the first order. The concept of an in-kind or property interest award by a federal court in equity, as compensation for injury without proof of financial loss, cannot be extrapolated from the concept of the time value of money. Interest by its very nature is money.

Unless reversed by this Court, the Ninth Circuit's opinion creates a new paradigm where non-monetary interest in some form of property, not just water, can be awarded as additional compensation on a judgment under the guise of an interest, that is not measurable by the traditional metrics of a monetary interest award.

ARGUMENT

I. RETROACTIVE APPLICATION OF THE SETTLEMENT ACT VIOLATES THE DOCTRINE OF SEPARATION OF POWERS AND IS UNCONSTITUTIONAL.

A. Introduction.

Acts of Congress that seek to resolve particular disputes or provide relief to special interests or

parties are not uncommon and may be a proper use of legislative powers. But what Congress sought to accomplish under Sec. 209(j)(1)-(3) of the Settlement Act is not. Congress, prompted by individual favoritism, brazenly attempted to retroactively create a claim for relief in favor of the United States and the Tribe, long barred by a final federal judicial water decree and by removing jurisdiction of a court to hear and determine the validity of the Secretary's prior regulations in any action brought under the Settlement Act. In doing so, Congress violated the doctrine of separation of powers in Article III of the United States Constitution.

Under the separation of powers doctrine, a court will construe as unconstitutional legislation enacted by Congress which prescribes a rule of decision in a case pending before the court in a manner that requires the court to decide the controversy in the Government's favor. *United States v. Klein,* 80 U.S. 128 (1872). Congress has the law-making power, but the power to construe laws in the course of their administration between citizens is vested in the courts. It is a fundamental principle of constitutional protection that the legislative power shall be separate from the judicial. To declare what the law is, or has been, is a judicial power. *Stockdale v. The Insurance Companies*, 87 U.S. 323, 333 (1874). In *Stockdale,* this Court held that legislation construing the intent of 1864 tax statutes was upheld because construction "was not in . . . essence an attempt to construe a statute differently from what the courts had construed it." *Id.*

B. Congress May Not Retroactively Dictate to the Judiciary What the Law Was at a Time Past That Must Be Applied by Courts to a Particular Case.

In Sec. 209(j)(3) Congress dictated the substantive legal standards for the Judiciary to apply in an action that the Settlement Act directed that the Secretary pursue to enforce the 1973 OCAP. The Settlement Act stacked the deck in favor of the Government in advance of an action being brought in recoupment.

In *Plaut v. Spendthrift Farm, Inc., et al.*, 514 U.S. 211 (1995) this Court addressed the constitutional vice in legislation that sought to retroactively command federal courts to reopen final judgments as being a violation of Article III.[10] *Id.* at 219-225. The same holds true here. The violation of the separation of powers doctrine in Sec. 209(j)(1)-(3) exists because Congress by legislative action deprived federal courts

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[10] Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that a judgment conclusively resolves the case because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990). See *Plaut*, 514 U.S. at 218-219.

of the jurisdiction to apply final federal judgments and decrees, precluding their conclusive effect when they were announced.[11]

The retroactive application of the Settlement Act violates the separation of powers doctrine precisely because it prescribes what the law was at an earlier time when the regulations had been enacted with no regard to subsequent judicial action. "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case . . . such an act exceeds the powers of Congress." *Id.* 226-227.

The stated purposes of the Settlement Act in Section 202 may be laudatory, given the near century of litigation over water rights on the Truckee and Carson Rivers. The Settlement Act, however, went beyond purchasing peace in the valley when it retroactively reinstated the 1973 OCAP, directing the Secretary to adhere to *Tribe v. Morton,* which had been effectively overruled by the final *Alpine* Decree, and when it forbade courts from hearing any challenge to any prior actions of the Secretary under prior OCAPs.

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[11] "[P]ower is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction . . . that the judgment was wrong;" *Plaut* 524 U.S. at 228-229.

The purpose for imposing this legal straightjacket on courts was that no action for recoupment of water allegedly over diverted under the 1973 OCAP, could have been otherwise brought. The record in the District Court is clear that the amount diverted was less than permitted under the final *Alpine* Decree. Thus, no recoupment would have been permissible.

C. Congress' Mandate in Section 209(j)(2) of the Settlement Act Violated the Separation of Powers Doctrine When Congress Dictated the Law to be Applied in the Recoupment Action.

When the Settlement Act was enacted in 1990, the *Alpine* Decree had become final. It established that the appropriate amount of water that could be diverted into the Project to achieve beneficial use, was the same as under *Orr Ditch*, 3.5/4.5 afa and historically was never the 2.92 afa adopted in *Tribe v. Morton* and the 1973 OCAP.[12] The underlying premise in *Tribe v. Morton* had effectively been overruled by the final *Alpine* Decree. Any attempt by Congress to reestablish the 2.92 afa limitation is in direct violation of the final *Alpine* Decree. The Settlement Act was a thinly disguised attempt by Congress to nullify and allow a collateral attack on the *Alpine* Decree

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[12] The United States by the time the *Alpine* case was being tried was advocating 3.0 afa and not the 2.92 afa. *Alpine Land and Reservoir Co.*, 503 F. Supp. at 885-887.

that had become final. That Congress could not constitutionally do.

The only purpose served by enacting special legislation requiring adherence to *Tribe v. Morton* was to avoid the federal court decisions that came seven years later, which rendered the 1973 OCAP unenforceable. These provisions of the Settlement Act are unconstitutional as a violation of Article III of the United States Constitution.

D. The Court of Appeals Erred In Concluding the Settlement Act Was Valid and Enforceable.

The Ninth Circuit upheld the District Court's enforcement of the 1973 OCAP under the Sec. 209(j)(3) direction to pursue an action in recoupment based upon the water duty of 2.92 afa set in *Tribe v. Morton*. It ignored the fact that this water duty was determined not to achieve beneficial use and was supplanted by the 3.5/4.5 afa of the final *Alpine* Decree.

These provisions of the Settlement Act are unconstitutional to the extent that Congress has retroactively reinstated regulations of the Secretary that had been voided by subsequent judicial judgments and decrees, and Congress' attempt to preclude a court from hearing challenges to the enforcement of these provisions and to disregard final judgments entered before enactment of the Settlement Act are likewise unconstitutional.

For all intents and purposes, the 1973 OCAP was no longer enforceable by 1990 when Congress enacted the Settlement Act, and Congress could not resurrect the 1973 OCAP as a basis for liability in a recoupment action for its violation after the Final *Alpine* Decree vacated the *Alpine* TRO. *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947) ("(t)he right to remedial relief falls with an injunction which events prove was erroneously issued.")

E. Congress' Attempt to Proscribe the Judiciary's Review of Secretary's Actions Pursuant to the Settlement Act is Unconstitutional.

Section 209(j)(2) provides that "All actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid and shall not be subject to review in any judicial or administrative proceeding, . . . "

The jurisdiction and powers of the judicial department pursuant to Article III were defined by this Court in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803). The blatant attempt by Congress to prohibit access to the courts to seek review of the executive's action pursuant to this Act, as demonstrated above, is unconstitutional. The Ninth Circuit's failure to recognize this defect in the Settlement Act requires reversal of their decision.

II. THE NINTH CIRCUIT OPINION IF NOT REVERSED WILL SERVE AS A PRECEDENTIAL FOOTHOLD FOR FEDERAL COURTS TO FASHION AWARDS OF NON-MONETARY INTEREST IN EXCESS OF THEIR JURISDICTION.

A. A Federal Court is Without Jurisdiction to Make an Award of Post-judgment Non-monetary Interest in the Absence of Statutory Authority.

The Ninth Circuit should have reversed outright the District Court's award of two percent post-judgment interest on the recoupment judgment. Although the opinion acknowledged that no legal precedent supported an award of water interest, it would not foreclose the possibility of an equitable basis and remand was made to the District C

ourt with directions to determine if there is a factual basis for awarding more water than was originally taken so as to provide complete relief to the United States and the Tribe. On its face, this remand exceeded the jurisdiction of the District Court as no factual basis could justify a postjudgment interest award if not made pursuant to 28 U.S.C. § 1961(a).

All of the legal reasons to reverse the District Court's award of water interest were recognized by the Court of Appeal. There was a recognition that this Court's decision in *Pierce v. United States,* 255 U.S. 398, 406 (1921) requires that postjudgment awards in federal courts be based on statute and not common

law. There was a recognition that no legal precedent supported such an award. And, there was a recognition that the only applicable federal statute is 28 U.S.C. § 1961(a), which permits only interest on monetary judgments. There was not, however, any acknowledgement that a postjudgment interest award under § 1961(a) must be in money.

The Ninth Circuit has previously recognized that the "federal [r]ules govern the procedure in the United States district courts in all suits of a civil nature." Fed. R. Civ. P. 1. *United States v. Orr Water Ditch Company, et al.*, 391 F.3d 1077, 1082 (9th Cir. 2004)[13] This Court has held that in all civil cases, both law and equity, federal courts must apply the Federal Rules of Civil Procedure. *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992). There could be no equitable basis for an award of non-monetary water interest as awarded by the District Court in the recoupment claim brought under the Settlement Act.

The Ninth Circuit relied upon dicta in this Court's original jurisdiction decision of *Texas v. New Mexico,* 482 U.S. 124, 132, n.8 (1987), as precedent that there may be an equitable basis to uphold the District Court's award of postjudgment interest in water depending on the factual record to be developed

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[13] "[W]hen a situation is covered by one of the Federal Rules, . . . the [district court must] apply the Federal Rule, and can refuse to do so only if . . . the Rule in question transgresses[ ] the terms of the [Rules] Enabling Act [or the Constitution]." *Hanna v. Plumer,* 380 U.S. 460, 471 (1965).

on remand. However, there is nothing in this footnote discussion that suggests this Court intended that this dicta was to be used as precedent for federal courts to depart from the Federal Rules or create a new form of non-monetary water interest.[14] In *Texas v. New Mexico*, the Supreme Court sat in original jurisdiction in an action arising between states over violations of a state water compact and was not bound to follow the Federal Rules regarding awards of postjudgment interest, as must a federal court. No award of water interest was directed to be made, and the discussion of a possible award of "water interest" remained dictum.

Neither the Court of Appeals nor the District Court had jurisdiction to base a non-monetary postjudgment water interest award on *Texas v. New Mexico*, in disregard of existing Supreme Court authority requiring federal courts to derive jurisdiction for an award of postjudgment interest from the Federal Rules.

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[14] Footnote 8 reads in pertinent part: "If the Special Master recommends and we approve a judgment for money damages, Texas will be entitled to postjudgment interest until the judgment is paid. If damages are not awarded or a damages judgment is not paid, it would appear it would be necessary to make up the shortfall by delivering more water . . . and Texas would have a judgment against New Mexico for 340,100 acre-feet of water which, if not delivered . . . would entitle Texas . . . to some form of post-judgment interest for the period during which that judgment is not satisfied. We are unpersuaded however, that "water interest" rather than money, should be awarded unless and until it proves to be necessary." (citation omitted).

The Ninth Circuit also directed the District Court to explain how it arrived at an interest rate of two percent, but did not provide the District Court with direction on how a monetary interest rate could apply to an in-kind award or point to a benchmark from which the award could be calculated. Interest rates are tied to the concept of the time value of money as means of quantifying lost use of money. Under 28 U.S.C. § 1961, the District Court must use a rate equal to the weekly average 1-year constant maturity Treasury yield on money judgments. It would be convenient but unsupportable to borrow that interest rate for a financial loss to calculate an in-kind award, and it would be based on conjecture, not precedent or statute.

B. Awards of Non-monetary Pre-judgment Interest Do Not Exist in the Federal Courts.

Pre-judgment interest is money awarded as compensation for the loss of its use. The Ninth Circuit in its desire to find a means to award the Tribe more water than the evidence established, created the concept of pre-judgment interest in water to compensate the Tribe for a loss that neither the United States nor the Tribe pled nor proved in the District Court.

There is no comparable analogue for in-kind pre-judgment interest, whether in water or otherwise, in any decision of this Court or in any federal court

precedent, even in equity. The general federal interest statute, 28 U.S.C. § 1961 is silent as to pre-judgment interest, which has led this Court to conclude that such awards rely on judge-made principles. *Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 194 (1995).

The decision below disregarded long standing authority in the Ninth Circuit directing district courts to apply 28 U.S.C. § 1961 for fixing the rate for pre-judgment interest in cases where pre-judgment interest may be awarded, unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate, but the award is always monetary. *Western Pac. Fisheries, Inc. v. SS President Grant,* 730 F.2d 1280, 1289 (9th Cir. 1984).

This Court has consistently recognized that a monetary award does not fully compensate for an injury unless it includes pre-judgment interest on the loss. See e.g. *Kansas v. Colorado*, 523 U.S. 1, 10 (2001) (money damages award in an interstate river compact); *Milwaukee*, 515 U.S. at 195 (1995) (pre-judgment interest award on monetary damages award in admiralty damages action); *West Virginia v. United States*, 479 U.S. 305, 310-311 (1987) (pre-judgment interest awarded in money damages award under contractual obligation owed to the United States); *General Motors Corp. v. Devex Corp.,* 461 U.S. 648, 655, n.10 (1983) (pre-judgment interest required on money damages award in patent infringement suits). In each of these decisions, this Court supported awards of pre-judgment interest to

fully compensate an injured party "for the loss of use of money due as damages from the time the claim accrues until judgment is entered." *West Virginia,* 479 U.S. at 310-311 n.2.

The United States elected to recover water in a recoupment action brought under the Settlement Act. Section 209(j)(3) did not preclude a monetary damage claim but none was brought. A claim for monetary damage could have supported recovery of pre-judgment interest as did the damages claim in *Kansas v. Colorado*; a judgment to recoup water cannot.

CONCLUSION

The Ninth Circuit's decision upholding the Settlement Act is flawed under separation of powers doctrine, an important constitutional ground, by directing a collateral attack on a final court decree and further, by precluding any Judicial review. The Ninth Circuit also exceeded its authority by endorsing a federal court in awarding non-monetary interest in the form of water. For the reasons discussed about, the petition for writ of certiorari should be granted

and the Ninth Circuit's opinion and judgment thereon reversed.

September 20, 2010

Respectfully submitted,

MICHAEL J. VAN ZANDT
Counsel of Record for Petitioners
THEODORE A. KOLB
NEIL R. BARDACK
HANSON BRIDGETT LLP
425 Market Street, 26th Floor
San Francisco, CA 94105
(415) 777-3200
MVanZandt@hansonbridgett.com

App. 1

UNITED STATES of America,
Plaintiff-Appellee,
v.
Arthur W. Bell, IV; Peraldo Brothers; Christine L. Matley Family Trust; Ray Conlan; Francis E. Dubois, III; Fallon Paiute Shoshone Indian Tribe; City of Fallon; Frey Ranch Partnership; Debra S. Frey; Charles P. Frey, Jr.; Calvin Moffitt; State of NV Div of L, Division of Lands; State of Nevada Parole Dept., Division of Wildlife; Stillwater Farms, Inc.; The Larry Fritz Family Trust; Town of Fernley,
Defendants,
and
Board of Directors of TCID
(Truckee Irrigation District), Defendant-Appellant.

United States of America, Plaintiff-Appellant,
v.
Arthur W. Bell, IV; Peraldo Brothers; Christine L. Matley Family trust; Ray Conlan; Francis E. Dubois, III; Fallon Paiute Shoshone Indian Tribe; City of Fallon; Frey Ranch Partnership;,Debra S. Frey; Charles P. Frey, Jr.; Calvin R. Moffitt; State of NV Div of L, Division of Lands; State of Nevada Parole Dept., Division of Wildlife; Stillwater Farms, Inc.; The Larry Fritz Family Trust; Town of Fernley, Defendants,
and
Board of Directors of TCID (Truckee Irrigation District) Truckee-Carson Irrigation District, Defendant-Appellee.

No. 05-16154, No. 05-16157, No. 05-16158, No. 05-16187, No. 05-16189, No. 05-16909

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

602 F.3d 1074; 2010 U.S. App. LEXIS 8148

October 8, 2009, Argued and Submitted,
San Francisco, California
April 20, 2010, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the District of Nevada. D.C. No. CV-95-00757-HDM. D.C. No. CV-95-00757-HDM. D.C. No. CV-95-00757-HDM. No. CV-95-00757-HDM. No. CV-95-00757-HDM. No. CV-95-00757-HDM. Howard D. McKibben, District Judge, Presiding.

DISPOSITION: AFFIRMED in part, VACATED in part, and REMANDED.

COUNSEL: Katherine J. Barton, Washington, D.C., for plaintiff-appellee/appellant United States of America.

Don Springmeyer, Las Vegas, Nevada, for intervenor appellee/appellant Pyramid Lake Paiute Tribe of Indians.

Michael J. Van Zandt, San Francisco, California, for defendant-appellant/appellee Board of Directors of Truckee Irrigation District.

Michael L. Wolz, Reno, Nevada, for defendants-appellants State of Nevada.

Michael F. Mackdon, Fallon, Nevada, for defendants appellants State of Nevada.

JUDGES: Before: Mary M. Schroeder and Marsha S. Berzon, Circuit Judges, and Milton I. Shadur,* District Judge. Opinion by Judge Schroeder.

OPINION BY: Mary M. Schroeder

OPINION

SCHROEDER, Circuit Judge:

BACKGROUND

The long, divisive history of this and related litigation over the waters of the Truckee and Carson Rivers, and the decline of Pyramid Lake, is best reflected in *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983), and in several landmark opinions of this and other courts. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364 (9th Cir. 1989) ("*Tribe v. Hodel*"); *Truckee-Carson Irrigation Dist. v. Sec'y of Dep't of Interior*, 742 F.2d 527 (9th Cir. 1984) ("*TCID v. Secretary*"); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) ("*Tribe v. Morton*"). Congress had passed the

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Reclamation Act in 1902, creating projects to reclaim otherwise arid western lands for farming. *See* Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388. One of the projects created by the Reclamation Act, the Newlands Project ("Project"), controls diversions from the Truckee and Carson Rivers. The Truckee-Carson Irrigation District ("TCID") has managed the Project under a contract with the federal government for decades. This particular case concerns the United States' effort to recoup excess diversions TCID permitted over many years.

The Nevada district court originally established the amount of water that could be diverted for agricultural uses from the Truckee River in a 1944 order known as the *Orr Ditch* decree, Equity No. A-3 (D. Nev. 1944). The court did not issue a final order on rights to the Carson until 1980, in *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980) ("*Alpine* decree").

In the mid-20th Century, concerns grew over the adverse effect of the diversions on Pyramid Lake's unique fish populations. *See Nevada*, 463 U.S. at 119 n.7 (noting surface area of Pyramid Lake decreased by 20,000 acres between 1920 and 1940). Water from the Truckee naturally flows to Pyramid Lake which is under the control of the Pyramid Lake Paiute Tribe ("the Tribe"). The Secretary of the Interior ("Secretary") responded to the concerns about Pyramid Lake fish in 1967 by imposing operating criteria and procedures ("OCAPs") limiting the maximum diversions from the Truckee and Carson.

Unhappy with the OCAPs as too generous to the farmers, the Tribe successfully challenged them in the District of Columbia. The D.C. district court in *Tribe v. Morton*, 354 F. Supp. at 256, ordered the Secretary to implement a more restrictive OCAP. Known as the "1973 OCAP," it was challenged by TCID in this court. We upheld it in *TCID v. Secretary*, 742 F.2d at 532, yet TCID has refused to follow it.

In 1990, Congress stepped in to attempt a resolution of the ongoing dispute between the Tribe and TCID by enacting the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3289 ("Settlement Act"). The Settlement Act, as relevant to this case, provides:

> The Secretary shall henceforth ensure compliance with all of the provisions of the operating criteria and procedures referenced in paragraph (2) of this subsection or any applicable provision of any other operating criteria or procedures for the Newlands Project previously adopted by the Secretary, and shall, pursuant to subsection 709(h) or judicial proceeding, pursue recoupment of any water diverted from the Truckee River in excess of the amounts permitted by any such operating criteria and procedures.

Settlement Act § 209(j)(3). The Settlement Act also states that it should not be read in such a manner as to conflict with the *Orr Ditch* and *Alpine* decrees. *See* Settlement Act § 210(b)(13).

Five years after the enactment of the Settlement Act the United States instituted this case by filing a complaint against TCID, its board members, and all water users in the Project as a class, seeking to recoup over one million acre-feet ("af") of water diverted in excess of applicable OCAPs from 1973-1988. The Tribe intervened as a plaintiff.

After lengthy evidentiary proceedings, the district court in 2003 issued its decision holding that TCID had willfully failed to comply with the 1973 OCAP. Nevertheless, although the government had sought over a million af of water as recoupment, the district court awarded just under 200,000 af. The court credited the report of TCID's expert and concluded that the government was only entitled to recoupment for excess diversions in 1974, 1975, 1978 and 1979; the court also awarded recoupment for spills of water in 1979 and 1980. The court held that the government, and not TCID, was responsible for excess diversions after 1980, because the government had failed to revise the OCAPs to reflect the water duties in the 1980 *Alpine* decree.

With respect to interest on the water TCID owed the government by virtue of its decision, the court initially denied both prejudgment and postjudgment interest. The reasons it gave were the government's delay in bringing this action and the government's having inadvertently destroyed certain records relevant to the litigation. The district court later modified this decision and awarded postjudgment water interest. It ruled TCID must repay two-percent each year

on the balance of water remaining to be recouped for replenishing the waters of Pyramid Lake.

TCID now appeals the district court's ruling that the government under the Settlement Act can pursue any claim for past excess diversions. It also appeals the award of postjudgment interest on water yet to be recouped and, on behalf of water rights holders ("farmers"), it appeals the denial of attorneys' fees under the Equal Access to Justice Act ("EAJA"). Nevada, a party to the case because it owns some of the irrigated land, appeals the denial of its claim for costs.

The government and the Tribe cross-appeal the denial of prejudgment interest. They also appeal the district court's rejection of the government's position that more recoupment should have been ordered as a result of gauge error in measuring the excess diversions and the denial of recoupment for diversions and spills occurring between 1980 and 1984.

Because the district court's judgment followed a bench trial, this court reviews the district court's findings of fact for clear error and its conclusions of law de novo. *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby*, LLP, 583 F.3d 1232, 1236 (9th Cir. 2009). We vacate the district court's rulings with respect to interest and remand for the court to explain the legal basis for its unprecedented award of interest that must be repaid in water. We also reverse the denial of the government's claim that gauge error

was not properly accounted for. We otherwise affirm the district court's judgment.

DISCUSSION

I. This Action Was Properly Maintained Pursuant to the Settlement Act.

TCID's fundamental position is that Congress, in passing the Settlement Act, did not intend to create a judicially enforceable cause of action to allow the government to recoup excess diversions for past violations of OCAPs. TCID's position is not supported by the language, history, or purpose of the Act.

Congress passed the Settlement Act to encourage settlement of litigation and pending claims, to fulfill its trust obligations to the Tribe, and to promote the recovery of Pyramid *See* Settlement Act § 202(d)-(f). Congress optimistically envisioned the possibility of TCID and the government achieving these goals through a settlement. This is evidenced in Settlement Act § 209(h)(1) which provides that certain provisions of the Act would not go into effect "unless and until the Truckee-Carson Irrigation District has entered into a settlement agreement with the Secretary concerning claims for recoupment of water diverted in excess of the amounts permitted by applicable operating criteria and procedures." To facilitate settlement, the Act includes a provision allowing the Secretary to cancel certain TCID repayment obligations. *See* Settlement Act § 209(g). Given the years of contentious litigation surrounding Pyramid Lake, however,

Congress recognized that such a settlement might not occur.

Accordingly, Congress included Section 209(j)(3) in the Settlement Act. It directs the Secretary to "ensure compliance with all of the provisions of the [OCAPs]", and expressly refers to compliance with "previously adopted" OCAPs. *See* Settlement Act § 209(j)(3). That section in turn directs the Secretary to "pursue recoupment of any water diverted from the Truckee River in excess of the amounts permitted by any [OCAP]" and to do so "pursuant to . . . [a] judicial proceeding."

TCID contends the statute merely permits the Secretary to prevent future violations of the OCAPs. But the statutory language is mandatory, and the purpose of the Act was to remedy past violations. Section 202 declares the purpose of the Act to promote the "recovery of the Pyramid Lake fishery." The stated purpose demonstrates that Congressional intent was to restore the Lake, not to maintain the status quo.

Moreover TCID is mistaken in suggesting the court was somehow imposing a new and not clearly authorized duty with respect to past misconduct. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (noting legislation may be applied retroactively only where Congressional intent is clear). The court acted pursuant to express Congressional authority to redress past violations of the limits that were in effect when the

excess diversions took place. Thus, the district court did not err in finding the Settlement Act unambiguously authorizes the government to seek recoupment for TCID's prior violations of OCAPs via this action.

II. The District Court's Decision Does Not Conflict With the Water Decrees.

TCID, joined by Nevada, also argues that even if a cause of action exists, the district court's decision allowing recoupment conflicts with the *Orr Ditch* and *Alpine* decrees, essentially because there is not enough water both to satisfy the requirements of the decrees and to restore Pyramid Lake. TCID is correct that the Settlement Act itself recognizes that it is not intended to affect the rights of farmers under the decrees. *See* Settlement Act § 210(b)(13). The district court recognized that replenishing the water of Pyramid Lake while still providing farmers with the water they are due will prove a difficult task because of the substantial water duties the decrees established for agriculture.

The *Orr Ditch* and *Alpine* decrees set the water duty for Newlands farmers at 3.5 acre feet per acre ("afa") for bottom lands, and 4.5 afa for bench lands. This allowance, however, is limited by the principle of beneficial use. 43 U.S.C. § 372; *see also Ickes v. Fox*, 300 U.S. 82, 90, 57 S. Ct. 412, 81 L. Ed. 525 (1937). We have described beneficial use as "a dynamic concept, which is variable according to conditions, and therefore over time." *Alpine Land & Reservoir*

Co., 697 F.2d at 855 (internal quotation marks and citation omitted). It is not a hard and fast unit of measurement. The district court's decision here made it clear that it was reserving for the future the annual calculation of the actual amounts to which each farmer would be entitled applying the concept of beneficial use. Therefore we do not yet know how much water the government will recoup in any given year. We also do not know how much water will be available to meet the competing demands. Conservation may increase the supply. At oral argument counsel for the Tribe explained, for example, that TCID can implement water conservation measures that create "credit water." If so, TCID can send this "credit water" to Pyramid Lake, rather than to farmers, in satisfaction of the judgment. Indeed, we were told this process has already begun.

Even if it proves difficult, TCID has not convinced us that the district court's recoupment order will be impossible to implement. It is for the district court in administering the order to ensure the recoupment process remains consistent with the *Orr Ditch* and *Alpine* decrees. Given TCID's past record of noncompliance, it is for TCID to make a good faith effort to maximize the supply of water to meet the competing demands.

III. The 1973 OCAP Is Valid and Enforceable.

TCID makes a related argument that the 1973 OCAP, which the district court found to have been

violated between 1973 and 1980, was not valid. The 1973 OCAP was directed by the court in *Tribe v. Morton* and embodied in a regulation promulgated by the Secretary. It remained in effect through 1984. This OCAP's maximum diversions were premised on the Carson's then-existing water duty of 2.92 afa. The 1980 *Alpine* decree raised this water duty to 3.5 afa/4.5 afa for bottom and bench lands respectively. TCID thus argues that the increased water duties created in the *Alpine* decree invalidated the 1973 OCAP, making it unenforceable as a basis for recoupment.

The Settlement Act again forecloses this argument by declaring that "[a]ll actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid." Settlement Act § 209(j)(2). The Act thus validates the 1973 OCAP, as it became a regulation promulgated by the Secretary acting at the direction of the court in *Tribe v. Morton*. The Settlement Act even expressly requires the Secretary to "act in a manner that is fully consistent with the decision in the case of [*Tribe v. Morton*]." *See* Settlement Act § 209(j)(1). The district court did not err in ordering the 1973 OCAP to be enforced.

IV. TCID's Remaining Challenges to the Recoupment Order.

TCID's several additional attempts to sidestep account-ability under the Settlement Act have no

merit. TCID contends the district court was without power in equity to order the transfer of water from TCID to the government or Tribe because neither has any relevant water rights. TCID does not dispute that it controls all diversions of water from the Truckee and Carson Rivers, and the Settlement Act is clear in its mandate for recoupment of excess diversions to protect the Tribe's enjoyment of Pyramid Lake. Thus, the requirements of the Settlement Act may only be accomplished by the court's order requiring TCID to manage the recoupment process.

TCID also contends the district court's recoupment order in effect constitutes a civil contempt order or penalty because it orders TCID to account for violations of the 1973 OCAP and that it cannot constitute a valid contempt order because the 1973 OCAP is no longer in effect. The district court, however, entered a judgment in an action maintained pursuant to the Settlement Act. The court did not impose a penalty or hold TCID in contempt for violating a judicial order. *See FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (noting that a party is in contempt only when it first violates a judicial order).

Estoppel does not preclude the government from bringing this suit, despite TCID's claim that it relied on the government's statements decades ago that it would not enforce the 1973 OCAP. Even if the government took a different position in the past, the "[g]overnment may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health*

Servs. of Crawford County, Inc., 467 U.S. 51, 60, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984). For the government to be estopped, TCID must establish that the government engaged in "affirmative misconduct," and that the government's conduct has caused "a serious injustice." *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989) (en banc).

TCID contends that the government committed affirmative misconduct by not enforcing the OCAPs in the past. But affirmative misconduct requires an "affirmative misrepresentation or affirmative concealment of a material fact by the government" that "go[es] beyond mere negligence." *Id.* The simple nonenforcement of a regulatory requirement certainly does not rise to this level. *See Western Pioneer, Inc. v. United States*, 709 F.2d 1331, 1339 (9th Cir. 1983).

TCID points to the government's argument in a 1973 lawsuit by environmental plaintiffs that implementation of the 1973 OCAP by TCID was not imminent. This was not an instance of affirmative misconduct. TCID has not shown that the government's argument was a representation that it would never enforce the OCAP against TCID, let alone an intentional or reckless misrepresentation to that effect.

We thus hold the district court did not err in finding TCID liable under the Settlement Act for its violations of OCAPs. We now turn to the next issue, the extent of TCID's liability.

V. The District Court Should Reexamine the Awards of Pre- and Postjudgment Interest.

The novel issue in this appeal concerns the court's acceptance of the concept of interest payable in water. The judgment orders the return of water, not money, so the district court ordered interest to be paid in water. The district court's original decision denied both pre- and post-judgment interest to the government because it found that the government delayed in bringing this suit and accidentally destroyed a number of documents relevant to this litigation. The district court modified this decision without explanation when it entered judgment, and required that TCID pay postjudgment water interest in the amount of two percent each year on the outstanding balance of water due.

The court did not explain the basis for the award of water interest. TCID contends there is no basis. For the following reasons, we remand to the district court so that it may explain the basis in the record for its legal or equitable award of "water interest" – that is, water over the amount wrongfully diverted each year.

The purpose of postjudgment interest "is to compensate the successful plaintiff for being deprived of compensation for the loss of time between the ascertainment of the damage and the payment by the defendant." *Dishman v. UNUM Life Ins. Co. of America*, 269 F.3d 974, 989 (9th Cir. 2001) (internal

quotation marks and citation omitted). Under the common law there is no postjudgment interest, so the propriety of an award of postjudgment interest "rests solely upon the statutory provision." *Pierce v. United States*, 255 U.S. 398, 406, 41 S. Ct. 365, 65 L. Ed. 697 (1921). The statutory provision governing postjudgment interest in federal court allows such interest only "on any money judgment in a civil case." 28 U.S.C. § 1961(a).

TCID thus argues that because Section 1961(a) refers only to "money judgment[s]," the district court did not have the authority to award postjudgment interest in the form of water. TCID also notes that the district court's award of non-monetary post-judgment interest appears unprecedented.

The government and Tribe rely on the Supreme Court's decision in *Texas v. New Mexico*, 482 U.S. 124, 107 S. Ct. 2279, 96 L. Ed. 2d 105 (1987) as the authority for postjudgment water interest. In *Texas*, the Court considered a dispute regarding apportionment of the waters of the Pecos River under a compact between the states. *Id.* at 126-29. The Special Master's report recommended that New Mexico provide Texas with the water it had failed to pay under the compact, along with postjudgment interest should New Mexico fail to satisfy the judgment. *Id.* at 127-28. The Court remanded the case to the Special Master for consideration of whether a monetary award would be more appropriate, but discussed water interest in a footnote. *See id.* at 132-33 & n.8. The Court acknowledged its statement in *Pierce* that,

"postjudgment interest may not be awarded absent statutory authority," and acknowledged that no statute explicitly permits water interest. *Id.* However, the Court said it was "not bound by [*Pierce*] in exercising [its] original jurisdiction." *Id.*

The government contends on appeal that the Court thereby approved the award of water interest in circumstances like this. This, however, is not a case arising between states, and we are not the Supreme Court exercising original jurisdiction. The district court did not cite any authority to support an award of water interest. It did not discuss *Pierce* and its reliance on a statute that is not applicable here. Because neither case authority nor statutory authority authorize the district court's award of water interest, there appears to be no legal basis for an award. We do not foreclose the possibility of an equitable basis for such an award. *See Texas*, 482 U.S. at 132 n.8 ("We are unpersuaded . . . that 'water interest' . . . should be awarded unless and until it proves necessary."). But we do not believe that water interest is appropriate unless there is some factual basis for awarding more water than was originally taken so as to provide complete relief. Moreover, we do not have any explanation for why the court chose to award interest at the rate of two-percent as opposed to some other amount. The government's and Tribe's post-trial briefs before the district court requested this rate, but they gave no reason why this particular amount was appropriate. None has been provided to us.

Because the award of postjudgment water interest is unprecedented in the lower courts, and because the district court did not explain the factual basis for the award, we vacate the award of postjudgment interest and remand for further consideration by the district court. *See Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (en banc) (noting remand is appropriate where the district court fails to "make a sufficient record of its reasoning to enable appellate review"). On remand, the district court should determine whether water interest is necessary to "compensate [the government and Tribe] for being deprived of [water] for the loss of time between the ascertainment of the damage and the payment by [TCID]." *See Dishman*, 269 F.3d at 989. The district court should explain the basis, if any, for an award of postjudgment water interest, and then, if appropriate, explain the reason for selecting a particular rate.

The district court denied prejudgment interest. Awards of prejudgment interest, however, "ensure that an injured party is fully compensated for its loss." *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 195, 115 S. Ct. 2091, 132 L. Ed. 2d 148 (1995). There are no statutory restraints on awards of prejudgment interest. Unlike postjudgment interest, such awards are "governed by traditional judge-made principles." *Id.* at 194. Courts have further recognized that "a monetary award does not fully compensate for an injury unless it includes an interest component." *Kansas v. Colorado*, 533 U.S. 1, 10, 121 S. Ct. 2023, 150 L. Ed. 2d 72 (2001).

The district court denied the government and Tribe prejudgment interest because it found the government's delay in bringing this suit was unreasonable, and that the delay, coupled with the government's accidental destruction of relevant documents, warranted the denial of interest. The district court's determination that the government unreasonably delayed in bringing this lawsuit, however, is not supported by the record. Congress did not create the government's cause of action under the Settlement Act until 1990. *See* Settlement Act §§ 101, 209(j)(3). As envisioned by the Act, the government and TCID attempted to settle this dispute, because the government was supposed to pursue settlement efforts before instituting judicial proceedings. *See* Settlement Act § 209(h)(1). Only when these negotiations failed did the government initiate the present action. The negotiation understandably could have continued even more than five years, given the length and bitterness of the underlying disputes. Thus we conclude that the government did not unduly delay filing this action.

As to the accidental loss of certain documents, even if some of the documents lost may have had some relevance to this litigation, the district court itself did not deem that loss sufficient in and of itself to warrant denial of prejudgment interest. As we have already stated, prejudgment interest is to ensure parties here, including the Tribe, will be "fully compensated" for their loss. *City of Milwaukee*, 515 U.S. at 195; *cf. Amoco Prod. Co. v. Village of Gambell*,

AK, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987) (noting that in considering an injunction a court should consider the interests of "each party").

We therefore remand this issue to the district court for it to reconsider, in light of its explanation of the basis for awarding postjudgment interest, whether it should award pre-judgment interest. If water interest is appropriate for postjudgment interest, we conclude it should be awarded prejudgment as well.

VI. Challenges to the Amount of Water Ordered Recouped.

TCID, the government, and Tribe all appeal the total amount of water the district court ordered recouped. TCID contends the amount was too great and lacked support in the record. The government contends the district court erred in the other direction by erroneously accounting for gauge error and not awarding additional water recouped on the basis of Truckee spills after 1981. The Tribe independently contends the district court erred by not awarding recoupment for diversions of the Truckee between 1981 and 1984. We reverse the district court on the calculation of gauge error, but affirm the calculations on all other issues.

TCID appeals the district court's order of recoupment on the basis of excess diversions of the Carson between 1974 and 1979 and for 1979-1980 spills of the Truckee. The district court determined

that TCID had improperly diverted 45,175 af in 1974, 24,732 af in 1975, 44,168 af in 1978, and 58,946 af in 1979. The court further determined that there had been spills of the Truckee in the amount of 11,938 af and 12,193 af in 1979 and 1980 respectively.

TCID is not correct in its contention that the district court's calculations have no support in the record. In fact the calculations were based upon TCID's own expert's report. The district court's decision clearly stated that it credited the testimony of TCID's expert witness, Charles Binder, over that of the government's expert. Binder's reports on excess diversions of the Carson and spills of the Truckee reflected the exact values stated in the district court's decision. It is thus evident that the district court accepted Binder's calculations, and "we will not second guess its determination which was based on extensive testimony from experts for both sides." *U.S. v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1434 (9th Cir. 1994).

While we do not disturb the district court's general acceptance of TCID's expert witness evidence, we find the district court erred in accepting such evidence in one respect: the manner in which this expert report accounted for gauge error. The parties agree that the number of af in any diversion is based upon measurement of flow read from a gauge and that, for a variety of reasons, the actual flow may be more or less than measured flow. The parties thus agree that the government flow data based on these gauge measurements includes some margin of error,

represented by a "confidence interval." As the district court implicitly found, the flow data was sufficiently reliable for the government to meet its burden of proving damages with reasonable certainty.

Nevertheless, the district court accounted for statistical uncertainty in the flow data by subtracting the confidence interval from the published quantities, effectively assigning all of the uncertainty against the Tribe. There was no evidentiary basis for preferring values at the lower bound of the margin of error to the government's published quantities, which were already adjusted to take account of river condition, and which TCID never showed to be skewed in the Tribe's favor. We therefore remand for the district court to recalculate the amount of the diversions based on the government's published quantities and without regard to the confidence intervals.

Both the government and Tribe want more recoupment for 1981-1984, the government contending recoupment should have been awarded for spills and the Tribe for diversions. The district court denied recoupment for any 1981-1984 spills or excess diversions, because it found the government should have modified the terms of the 1973 OCAP in light of the increased water duties in the 1980 *Alpine* decree. The court was correct.

The D.C. court's order in *Tribe v. Morton* required the Secretary to ensure that all future OCAPs "give proper weight to the maximum farm headgate entitlements of both the *Orr Water Ditch* and *Alpine*

decrees." 354 F. Supp. at 260. The Settlement Act affirms the determinations made in *Tribe v. Morton*. *See* Settlement Act § 209(j)(1). Thus, when the 1980 final *Alpine* decree raised the water duty of the Carson from 2.92 afa to 3.5 afa/4.5 afa, the amounts of the farmers' entitlements increased. The Secretary should have changed the 1973 OCAP to reflect the increase. *See Tribe v. Morton*, 354 F. Supp. at 260. The Secretary did not do so. In the district court, however, the government did not show that the diversions exceeded what the increased allotments should have been. Because the *post-Alpine* OCAP did not conform to the order in *Tribe v. Morton* and also because the government failed to establish that TCID permitted diversions in excess of a properly calculated OCAP, the government has not shown it is entitled to recoupment for excess diversions during this period.

The government is entitled, however, to recoupment for spills during 1981-84. TCID's obligation to comply with the water duties cannot excuse spills, because the water duties are limited by beneficial use.

VII. The District Court Did Not Err in Denying Attorneys' Fees and Costs.

TCID's final challenge to the district court's decision pertains to the treatment of the farmers. The district court determined that the farmers did not have any individual liability under its decision. The

court, however, denied their motion to dismiss them from the suit and entered judgment against them along with TCID, so that they are bound by the judgment. The court also denied subsequent requests for attorneys' fees and costs because it found the farmers were not prevailing parties.

TCID argues that the district court erred "as a matter of law" by refusing to dismiss the farmers from this suit after finding they had no individual liability. However, in *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774 (9th Cir. 2005), this court rejected a similar argument. There, the EEOC challenged a company's policy of favoring individuals from the Navajo Nation in its hiring. *Id.* at 776-78. The government sought to add the Navajo Nation as a party to ensure it would be bound by whatever judgment the court issued. *Id.* at 780. This court recognized a "judgment w[ould] not bind the Navajo Nation in the sense that it w[ould] directly order the Nation to perform, or refrain from performing certain acts." *Id.* However, including the Nation would "preclude [it] from bringing a collateral challenge to the judgment." *Id.* The court thus concluded the Nation was a necessary party. *See id.*

The same logic applies here. The district court's refusal to dismiss the farmers prevents their collateral challenge to the recoupment order. This is important given the history of this litigation, where collateral challenges have not been uncommon. *See TCID v. Secretary*, 742 F.2d at 532 (rejecting TCID's collateral attack on *Tribe v. Morton*); *see also Tribe v.*

Hodel, 882 F.2d at 367 (recognizing that *TCID v. Secretary* was a collateral challenge to the decision in *Tribe v. Morton*). The district court's determination that the farmers had no liability did not require the court to dismiss them from the lawsuit and put them in a position to collaterally attack the judgment. *See Peabody Western Coal Co.*, 400 F.3d at 780.

TCID also argues the district court abused its discretion in denying the farmers' attorneys' fees under the EAJA as prevailing parties. *See* 28 U.S.C. § 2412(d). Nevada raises the related argument that the district court abused its discretion in denying costs. *See* 28 U.S.C. § 2412(a). We agree with the district court because the farmers/water rights holders, including Nevada, were not prevailing parties.

Under 28 U.S.C. 2412(a), a "prevailing party" in an action brought by the government is entitled to its costs. A "prevailing party" in such a case is also entitled to attorneys' fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). To qualify as a prevailing party, a litigant must obtain "a material alteration in the legal relationship of the parties [that is] judicially sanctioned." *Poland v. Chertoff*, 494 F.3d 1174, 1186 (9th Cir. 2007). This requires that a party "ha[ve] been awarded *some* relief by the court." *Id.* at 1186-87 (internal quotation marks and citation omitted). We review denial of fees for abuse of discretion. *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002).

Here the district court did not abuse its discretion in determining that the farmers had failed to obtain the requisite "judicially sanctioned" and "material alteration" in the relationship of the parties, so as to be considered a prevailing party. As the district court explained "judgment in this case was entered solely in favor [sic] the United States and the [Tribe]," so the government and Tribe were "the prevailing parties in this action."

The farmers contend they nevertheless were prevailing parties because the district court did not impose individual liability on them. The dispute is about water, not money, and TCID, as the cause of the diversions, must effectuate the judgment. The district court's decision bars the farmers from any collateral challenge to the judgment in order to obtain greater rights and requires that farmers cooperate in the recoupment process. The district court's judgment was entered pursuant to Congressional directive in the Settlement Act to compensate the Tribe for the excess diversions TCID permitted that benefitted farmers. The farmers are not prevailing parties in this case.

We affirm the judgment as to attorneys' fees and costs.

CONCLUSION

For the foregoing reasons, the judgment of the district court with respect to prejudgment and postjudgment interest is vacated and remanded for

further consideration. The judgment with respect to amounts of recoupment for excess diversions in 1974, 1975, 1978. 1979, and spills in 1979 and 1980 is vacated and remanded for recalculation of the effect of gauge error. The judgment with respect to spills from 1981-84 is vacated and remanded for a determination of the amount of water spilled during those years. The judgment of the district court is otherwise affirmed.

AFFIRMED in part, VACATED in part, and REMANDED. Each party is to bear its own costs.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOARD OF DIRECTORS, TRUCKEE-CARSON IRRIGATION DISTRICT, individually, and the TRUCKEE-CARSON IRRIGATION DISTRICT,

Defendants. /

CV-N-95-0757-HDM

DECISION

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
DEC -9 2003
CLERK,
U.S. DISTRICT COURT

BY _____ DEPUTY

D. EDWIN BRUSH, TED J. deBRAGA, RICHARD HARRIMAN, ROGER MILLS, JIM PERAZZO, RAY PETERSON, and WILLIAM E. SHEPARD,

Counterclaimants,

vs.

THE UNITED STATES OF AMERICA, and BRUCE BABBITT, Secretary pf [sic] Interior,

Counterdefendants. /

PYRAMID LAKE
PAIUTE TRIBE OF
INDIANS,

Intervenors. /

This action was tried before the court without a jury and after post-trial briefs has been submitted to the court for a decision.

The United States brought this action pursuant to Section 209(J)(3) of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3294. The government seeks to recoup water it contends was diverted from the Truckee River between 1973 and 1988 by the defendants in excess of the amount allowed under certain operating criteria and procedures promulgated by the Secretary of the Interior. The court in previous orders had allowed the Pyramid Lake Paiute Tribe of Indians (the Tribe) to join as intervenors and designated the Board of Directors of Truckee Carson Irrigation District as the representative of the class of all water users in the Newlands Reclamation Project.

The sole issue before the court is whether any of the defendants in this action diverted water from the Truckee and Carson Rivers between 1973 and 1988 in excess of that authorized and are legally obligated to repay that water to the United States pursuant to the provisions of the Settlement Act of 1990.

The court begins with a brief summary of the historical underpinnings of this case. In 1859 the

United States set aside approximately 500,000 acres in Nevada as a reservation for the Tribe. In 1902, Congress enacted the Reclamation Act of June 17, 1902 ("the Reclamation Act") and withdrew approximately 250,000 acres in western Nevada from public use in 1903. This land became a part of the Newlands Reclamation Project ("the Project"). 32 Stat. 388, 43 U.S.C. §§ 372 *et seq.* Section 10 of the Reclamation Act authorized the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect." 32 Stat. 388, 43 U.S.C. § 373. With the withdrawal of the public lands the Truckee-Carson Project was created and that project later became known as the Newlands Project. The Project was developed to convert arid land into farmland that was irrigated by waters diverted from the Carson and Truckee Rivers. Subsequent to the enactment of the Reclamation Act, the Secretary authorized the construction of approximately 250 miles of lateral and sub-lateral irrigation canals. The Project was operated and maintained by the Federal Reclamation Service until 1927.

The defendant, Truckee Carson Irrigation District ("TCID"), was organized as an irrigation district in 1918 pursuant to Nevada law. TCID was required to distribute and apportion the water to which the Project is entitled under any contracts with the United States in accordance with the acts of Congress, the rules and regulations of the Secretary of the Interior, and the provisions of the contract.

In 1913, during the construction of the Project, the United States filed suit on behalf of the Project and the Tribe, to adjudicate the water rights to the Truckee River. *United States v. Orr Water Ditch Co.*, Equity Docket A-3 (D.Nev. Sept. 8, 1944). Within the territorial boundaries of the TCID are lands owned by farmers and others entitled to receive water from the Newlands Reclamation Project. Water for the Project is drawn from the Truckee and Carson Rivers. The terminus of the Truckee River is Pyramid Lake. The Newlands Project water is diverted from the Truckee River at Derby Dam which is upstream from Pyramid Lake and is conducted through the Truckee Canal to Lahontan Reservoir on the lower Carson River. There, the "combined waters of the Truckee and Carson Rivers . . . are distributed for irrigation and related uses on downstream lands by means of lateral canals within the Newlands Reclamation Project." *Nevada v. United States*, 463 U.S. 110, 116 (1983).

The rights of the Newlands Project water users to Truckee River waters are governed by the Orr Ditch Decree. The final decree was entered in 1944 in *United States v. Orr Water Ditch Co.*, Equity Docket A-3 (D.Nev. Sept. 8, 1944). *See Nevada v. United States*, 463 U.S. at 116-118. Under the terms of the Orr Ditch Decree the amount of water allowed or used for irrigation shall not exceed 3.5 acre-feet per acre ("afa"), after transportation loss, for bottom lands and 4.5 afa for bench lands. No diversion is permitted except in the amount reasonably necessary for "economical and beneficial use." The rights of the

Project water users to Carson River waters are governed by the Alpine Decree, the final decree was entered on December 18, 1980 in *United States v. Alpine Land and Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir. 1983). That decree also provides for a maximum of 3.5 afa for bottom land and 4.5 afa for bench land provided such amounts are necessary for beneficial use. 503 F.Supp. at 881.

In 1926, the United States District Court for the District of Nevada entered its temporary restraining order in the *Orr Ditch* case. That temporary restraining order granted the United States a right to divert, store and use 1,500 cubic feet per second of water from the Truckee River through the Truckee Canal for the Newlands Project with a 1902 priority. This right was expressly made subject to "such control, disposal and regulation as the Plaintiff United States may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre-feet per acre for the bottom lands, nor 4.5 acre-feet per acre for the bench lands under the Newlands Project." The Secretary expressly reserved the right to make reasonable rules and regulations consistent with the provisions of the contract with TCID and TCID agreed to fully adhere to the rules and regulations in its operation of the transferred facility.

In 1949 and 1950, the United States District Court for the District of Nevada entered temporary

restraining orders in the case of *United States vs. Alpine Land and Reservoir Co.*, Equity No. D- 183. These orders confirmed the 1902 priority right of the United States to divert, store and use up to a flow of 5,000 cubic feet per second of the waters of the Carson River and its tributaries for the Project. This right also was expressly made subject to such control, disposal and regulation as the United States may make or desire provided that the amount of this water allowed or used for irrigation shall not exceed after transportation loss when applied to the land, 2.92 acre-feet of water per acre from all sources. This temporary restraining order remained in effect until the Alpine final decree was entered on December 18, 1980.

On December 18, 1926, in accordance with the provisions of the Reclamation Act of 1902, the United States, through the Secretary of the Interior, entered into a contract with TCID. That contract provided for TCID to manage and operate the facilities constructed by the United States that comprise the Newlands Project and for TCID to assume the obligation to repay the United States for construction costs of the Project. Article 34 of the contract provided:

> The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may deemed proper, and necessary to carry out the true intent and meaning of the law and of this contract, and

> [Petitioner] hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

In addition under Article 7 of the 1926 contract, TCID agreed to operate the Project works and deliver water therefrom "in full compliance with the national reclamation laws, as said laws now exist or as they may hereafter be amended or supplemented, court orders and decrees, contracts heretofore entered into between the United States and various persons for the delivery of water, the terms and conditions of this agreement, [and] the rules and regulations of the Secretary now enforced or hereafter promulgated." Article 32 empowered of the United States upon one years notice to terminate the contract for "breach of any of its terms or conditions."

In accordance with the provisions of Article 34 of the 1926 contract, the Secretary on August 26, 1966, published proposed rules in the Federal Register designed to guide the operation and control of the Project. 31 Fed. Reg. 11314 (1966). On February 21, 1967, the Secretary adopted final regulations, 32 Fed. Reg. 3091 (1967). The regulations were designed to ". . . initiate departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake." That provision recognized the United States' trust responsibility to the Tribe. 43 C.F.R. 418.1(b)(2003). The regulations specifically provide that the regulations "prescribe water uses within exiting rights" and

"do not, in any way, change, amend, modify, abandon, diminish, or extend existing rights." 43 C.F.R. 418.5 (2003).

The general purpose of the operating criteria and procedures ("OCAP") is to "govern the coordinated operation and control of the Truckee and Carson Rivers in regard to the exercise of water rights of the United States." 43 C.F.R. 418.3(a) (2003). The express purposes of the criteria and procedures are: (1) to comply with "all of the terms and provisions" of the Orr Ditch and Alpine decrees governing the use of Truckee and Carson River waters, and (2) to maximize the use of Carson River waters to satisfy the water requirements on the Newlands Project and thereby conserve Truckee River flows so as to make as much water available for Pyramid Lake as possible. 43 C.F.R. 418.3(a) (2003). The regulations also limit combined Truckee and Carson water diversions to 406,000 acre-feet per water year "if available" (43 C.F.R. 418.4(b) (2003)), subject to possible reduction in years after 1966 as the operating criteria provide a body of water-management experience (43 C.F.R. 418.4(c) (2003)). In addition the regulations as promulgated in 1967 and in effect during the relevant period of this action, expressly provide that "the District's operation of the irrigation works, including the diversion of water, shall be in compliance with all of the terms and provisions of the Orr Ditch and the Alpine decrees, the rules and regulations in this part, and the operating criteria and procedures adopted by the Secretary" (43 C.F.R. 418.4(a) (2003)).

Annual OCAPs thereafter were developed pursuant to the general regulations. The Secretary's 1972 OCAP established a limit on diversions for the Newlands Project in the amount of 378,000 acre-feet. *See* 37 Fed. Reg. 19838 (1972). As a result of a decision in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972 & 1973), the Secretary's 1972 OCAP was determined to be unlawful and the court ordered the Secretary to submit new OCAPs by January 1, 1973. TCID was not a party to this action, nor was the State of Nevada nor any of the individual water users.

The court approved operating criteria set forth in the Federal Register in March, 1973 (*See* 38 Fed. Reg. 6697 (1973)) and provided for a maximum diversion of water of 350,000 acre-feet for the Project in the 1973 water year. The court specified a maximum diversion of 288,129 acre-feet for the Project in the 1974 water year. 354 F.Supp. at 261-2. This figure was derived on the basis of the Project's needs, taking into account the 2.92 acre-feet per acre water duty under the temporary Alpine Decree that was then in effect for the Carson River. These new criteria were published and the Secretary took steps to implement them. The Bureau of Reclamation established programs to monitor TCID's operation of the Project in light of the new criteria. Efforts were made to determine the lands that possessed water rights in the Project and water measurement programs were initiated.

The District Court in *Tribe v. Morton* issued a supplemental memorandum and judgment and order with an accompanying OCAP in February of 1973. As indicated this supplemental memorandum reduced the maximum allowable diversions to 288,129 acre-feet. Again, this was based on a 2.92 afa water duty under the Alpine Temporary Restraining Order. The District Court's supplemental memorandum also recognized that some adjustments to the OCAP might be necessary after October 31, 1974. The court stated that the proof showed that the Secretary followed the practice of more or less renewing similar or identical criteria from year to year. *Id.* at 261. The court stated "there is no reason to believe from the record before the court that the general standards established by the court's judgment and order should otherwise change. The Secretary's fiduciary obligations will not alter and his continuing duty actively to supervise and upgrade the Newlands Project and to provide maximum water for Pyramid Lake will not change." *Id.* at 262.

The District Court's judgment and order recognized three ways that the court approved OCAP could be revised. First, changes could be agreed upon in writing by the Secretary and the Tribe. Second, changes could be ordered by the court after notice. And third, the court expressly recognized that the OCAPs were subordinate to the Orr Ditch and Alpine Decrees. Therefore any orders or judgments issued pursuant to the Nevada District Court's continuing

jurisdiction in those cases necessarily would supercede any inconsistent terms of the OCAP. *Id.*

In 1973, the Secretary sent a letter dated September 14, 1973 to TCID's Board of Directors stating that the 1926 contract would be terminated as of October 31, 1974 under Article 32 of the contract for continued and willful violations of the OCAP. The letter stated:

> This letter will notify you that any water diverted, used or stored in violation of the criteria will be deducted from water allowed to the District in subsequent years after the United States assumes control of Derby Dam and other project facilities. To illustrate: if the District were to divert and use a total of 388,000 acre-feet of water during the next water year, including over 100,000 acre-feet of Truckee River water, the United States will deduct 100,000 acre-feet from future deliveries of Truckee River water to which the District would otherwise be allowed under the operating criteria and procedures. (Exhibit 85 at 3).

In November of 1974, the Solicitor of the Department informed TCID that the Department regarded the 1926 contract as terminated as of October 31, 1974 and intended to assume control of the Project. TCID was notified that it would be held accountable for its actions as follows: "Until the Department assumes control of the Project facilities, we expect that the District will continue to be legally responsible for any consequences of its operation and the

United States takes no responsibility for the acts of the District, its agents and employees."

It is clear to the court that TCID at all relevant times to this litigation was aware of the potential consequences of any conduct on its part in refusing to comply with the OCAPs. On October 28, 1980, Judge Thompson issued the Alpine Final Decree and its accompanying opinion. See *Alpine I*. That decree adopted the same water duties for the Project that were set forth in the Orr Ditch Decree which allowed for maximums of 3.5 acre-feet per acre and 4.5 acre-feet per acre for bench and bottom lands respectively.

In 1981, TCID wrote a letter to the Secretary (Exhibit 306). In that letter TCID acknowledged that the OCAPs resulting from the *Tribe v. Morton* litigation had been adopted and readopted by the Secretary and further acknowledged that TCID never complied with the court imposed OCAP. In addition, the letter acknowledged that TCID "has released from the Truckee Canal and Lahontan Reservoir irrigation water in an amount that it concluded the District was entitled to release under the provisions of the Final Decree in the *Orr Ditch* case the temporary restraining order in the *Alpine* case which exceeded the releases specified in the OCAP." And, it finally reiterated TCID's position that the Secretary lacked jurisdiction to impose the OCAP particularly in light of the *Alpine* court's holding that the Project's water rights are owned by the farmers not by the United States and that "the OCAP is not required and is not necessary."

In August of 1983 this court entered its decision in *TCID v. Secretary*, Civil R. 74-34 (BRT), Aug. 17, 1983. In that decision Judge Thompson upheld the validity of the 1973 OCAP and found that TCID was obligated to comply with the 1973 OCAP and further concluded that TCID had deliberately violated the maximum allowable diversions under the 1973 OCAP. The court stated "the evidence demonstrates that TCID made no attempt to comply with the operating criteria . . . ," and that "TCID's attitude of complete defiance is incomprehensible," and that "it is . . . clear that self-help to the extent to which TCID availed itself is not the remedy." Id. at 22. Finally in February of 1984, the United States and TCID entered into a temporary Operation and Maintenance Contract in which TCID agreed to operate the Project facilities "in full compliance with the National Reclamation Law, . . . court orders and decrees; contracts heretofore entered into between the United States and various persons for the delivery of water, . . . the applicable rules and regulations of the Secretary now in force or hereafter promulgated. . . ." In September of 1984 the Ninth Circuit affirmed Judge Thompson's decision in *TCID v. Secretary*, 742 F.2d 527 (1985). The court held that the Secretary had the authority to adopt the operating criteria even if they were more restrictive than similar conditions under the 1926 contract and that the operating criteria (1973) were neither arbitrary nor capricious. 742 F.2d at 532.

The 1973 OCAP approved by the District Court in *Tribe v. Morton* covered diversions to and water

management in the Project through October 31, 1974. The 1973 OCAP was published in the Federal Register as required by law. On January 6, 1975, the Department published a notice in the Federal Register that the OCAP prescribed by the District Court in *Tribe v. Morton* for the period ending October 31, 1974 "shall until further notice continue in effect for the period ending October 31, 1975." 40 Fed. Reg. 1109 (1974). Thereafter, extending through October 24, 1979 the Department published similar notices in the Federal Register each year that the 1973 OCAP would continue in effect for each year ending on October 31 with minor adjustments. *See* 41 Fed. Reg. 5411

(February 6, 1976) which is the OCAP for 11/1/75 to 10/31/76; 42 Fed. Reg. 39492 (August 4, 1977) which is the OCAP for 11/1/76 to 10/31/77; 43 Fed. Reg. 40551 (September 12, 1978) which is the OCAP for 11/1/77 to 10/31/78; 44 Fed. Reg. 37561 (June 27, 1979) which is the OCAP for 11/1/78 to 10/31/79; and 44 Fed. Reg. 61267 (October 24, 1979) which is the OCAP for 11/1/79 to 10/31/80.

After the Alpine Final Decree was entered October 28, 1980, the United States entered into negotiations with TCID and the Tribe in order to develop new OCAPs for the Project that reflected the water duties contained in the final Alpine Decree.

In 1984, the Department issued interim instructions to TCID concerning Truckee Canal diversions pending completion of a new OCAP for the Project.

The tribe objected to these instructions and sought enforcement of the court's order of February 20, 1973 in the case of *Tribe v. Morton*. On July 30, 1984 the District Court set aside the interim instructions and reiterated that in order to revise the 1973 OCAP, the Secretary was required to obtain either the court's approval or the Tribe's acquiescence.

Thereafter in 1985, the Bureau of Reclamation entered interim OCAPs in the form of a series of instructions which set a new maximum project diversion and criteria for diversions of water from the Truckee River to the Lahontan Reservoir for the remainder of the year pending completion of a long term OCAP. This 1985 interim OCAP was extended through March 14, 1986 by order of the court. Then on March 11, 1986 the Department approved new interim OCAPs for the remainder of 1986. In January of 1987 the District Court, by minute order dated January 9, 1987, declared the 1987 interim OCAP to be in effect subject to further order after a hearing on objections and on January 15, 1988, all objections to the 1987 interim OCAP were dismissed.

Between the periods 1974 and 1984, the maximum project diversion allowable under the existing OCAPs was 288,129 acre-feet per year from both the Truckee and Carson Rivers. Under the 1985 interim OCAP which took into account the final Alpine Decree, the maximum allowable project diversion was 335,000 acre-feet. Under the 1986 interim OCAP the maximum allowable project diversion was 350,000 acre-feet. Under the 1987 interim OCAP the

maximum allowable project diversion was 362,000 acre-feet.

Between 1974 and 1981, the record clearly shows that TCID failed to comply with the OCAPs and repeatedly and publically refused to comply although requested on numerous occasions to do so. This is reflected in several minutes of the TCID board meetings and correspondence of officials in TCID together with the testimony of TCID's General Manager. At the trial of *TCID v. Secretary* in 1979 the General Manager testified that TCID had diverted more Truckee River water to the Project than was authorized under the 1973 OCAPs and had continued to refuse to comply with the 1973 OCAPs in other respects.

Between the periods 1973 to 1981, TCID diverted Truckee River water through the Truckee Canal for delivery to the Truckee division of the Project to Lahontan Reservoir and to the Carson division of the Project in excess of the amounts allowed under the OCAPs. The Secretary's authority to issue OCAPs for the Project was based on the broad delegation of rule making authority by Congress in Section 10 of the Reclamation Act of 1902. *See United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989). This rule making authority was expressly recognized and reserved in both the 1926 Contract and Claim 3 of the Orr Ditch Decree. The authority to issue the 1973 OCAP in particular was upheld by this court and was affirmed by the Ninth Circuit. *See TCID v. Secretary*, 742 F.2d 527 (9th Cir. 1984).

TCID, during the 1973 period forward, was obligated by the terms of the Orr Ditch Decree, Nevada law and the 1926 Contract to comply with the rules and regulations issued by the Secretary for the Project. Truckee River water rights for the Project under Claim 3 of the Orr Ditch Decree was expressly made subject to the control, disposal and regulation of the United States.

As an irrigation district organized under the provisions of NRS 539.283 (2002), TCID's distribution and apportionment of water delivered to it under its contract with the United States was required to be in accordance with acts of Congress and "the rules and regulations of the Secretary of the Interior." See NRS 539.283 (2002). Paragraph 6 of the 1926 Contract transferred the "care, operation and maintenance of all lands and works used for operative purposes" including Lahontan Reservoir, Derby Dam, and the Truckee Canal, to TCID reserving title to those works in the United States. And under paragraphs 7 and 34 of the 1926 Contract, TCID agreed to operate these "transferred works" in "full compliance with the national reclamation laws, as said laws may now exist or as they may hereafter be amended or supplemented," court orders and decrees, individual water delivery contracts, the terms and conditions of the 1926 Contract itself, and "the rules and regulations of the Secretary now enforced or hereafter promulgated . . . ".

Accordingly, the court concludes that TCID had an obligation to comply with the maximum allowable

diversion set forth in the 1973 OCAP. The evidence established that TCID failed to comply with the provisions of the 1973 OCAP and continuously maintained than it was not obligated to comply with the OCAP or the maximum allowable diversion set forth under the terms of the 1973 OCAP. This refusal by TCID to comply with the 1973 OCAP is reflected in the pretrial order entered in *TCID v. Secretary* as uncontested fact in which TCID's irrigation diversions in 1973 exceeded the 350,000 acre-feet specified in the 1973 OCAP. During the trial in *TCID v. Secretary*, TCID's general manager testified that TCID had diverted more Truckee water to the Project than was authorized under the 1973 OCAP. Between 1973 and 1976, Reclamation's project manager in Carson City repeatedly sent letters to TCID's project manager advising that flows in the Truckee Canal exceeded minimal terminal flow to Lahontan Reservoir and were in excess of those allowed by OCAP. In a letter dated May 19, 1981, from the President of TCID's Board of Directors to the Secretary, TCID acknowledged that it had not complied with the provisions of the 1973 OCAP.

It appears that Congress was aware of the fact that TCID failed to enforce limitations placed on the decrees against water users in the Newlands Project between 1973 and 1981 and failed to keep track of records of actually irrigated acreage in the Project, failed to make determinations as to bench lands and bottom lands, and delivered waters in excess of the maximum specified in the OCAP and in some

instances under the terms of the decrees. These facts were known by Congress when it enacted the Settlement Act in 1990. Section 210(b)(13) of the Act provides that nothing in the Settlement Act alters or conflicts with any vested and perfected Truckee River water rights, including those held by landowners within the Newlands Project. In addition, in the Settlement Act Congress declared as valid all actions previously taken by the Secretary under any OCAP and specifically directed that "in carrying out the provisions of this title, the Secretary shall act in a manner that is fully consistent with the decisions in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*," 354 F.Supp. 252 (D.D.C. 1973).

The court concludes that the United States has properly invoked the equity jurisdiction of this court to seek recoupment of water diverted in excess of the amounts allowed by the OCAPs as directed by the Settlement Act. When the United States is seeking equitable remedies for violation of federal statutes or regulations, the court's full equitable powers are available in fashioning such relief unless Congress has specifically provided otherwise. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946).

The court has previously concluded and reaffirms that the United States is bringing this action to protect a public interest.

The court concludes that the total amount of water diverted in excess of that allowed under the OCAPs between 1973 and 1987 for Truckee River

spills subject to recoupment is 24,131 acre-feet. This reflects the court's conclusion that there were no spills subject to recoupment for the years 1973 through 1978 and for the years 1985, 1986 and 1987. It further reflects the court's conclusions that in 1979 the spills subject to recoupment amounted to 11,938 acre-feet; in 1980 the spills subject to recoupment amounted to 12,193 acre-feet.

The court finds there were no excess diversions to the Truckee division subject to recoupment during the period 1973 through 1987.

The court further concludes that the total amount of excess diversions to the Carson division between 1973 and 1981 and 1985 through 1987 is 173,021 acre-feet. This reflects the court's conclusion that there were no excess diversions to the Carson division subject to recoupment in 1973, 1976, 1977, 1985, 1986, and 1987. The court has concluded that during 1974 the excess diversions to the Carson division subject to recoupment is in the amount of 45,175 acre-feet, in 1975 it is 24,732 acre-feet, in 1978 it is 44,168 acre-feet, and in 1979 it is 58,946 acre-feet. Between 1981 and 1984, the OCAPs did not properly reflect the water duties in the final Alpine Decree. The court has concluded that TCID is not responsible for alleged excess diversions or spills during that period of time. Therefore, the total excess diversions the court has concluded that are subject to recoupment in this action is 197,152 acre-feet.

In arriving at its decision on excess diversions, the court has drawn extensively from the testimony of Charles Binder, Michael Turnipseed, the Director of the Nevada Department of Natural Resources and former State Engineer, and Garry Stone, the Federal Water Master.

The court has relied heavily on the testimony of Michael Turnipseed in evaluating the operations that were occurring in terms of historical stream flow, the expected demand during the months and years in question, the storage content in Lahontan Reservoir, and the forecast information. In interpreting the data compiled from the Orlob reports, the court has discounted the testimony of Dr. Orlob because of fundamental errors he made that resulted in double counting. These errors were discovered by TCID's expert, Charles Binder, prior to the commencement of the trial. This was an important factor in the court's determination that Mr. Binder's testimony is entitled to substantial weight. By breaking the Truckee Canal terminal flows into three parts the testimony showed that there was a violation of the mass balance equation that resulted in the double counting.

The Binder report gave appropriate consideration to all of the specific OCAP criteria for determining the diversions. Dr. Orlob's analysis did not. It did not properly consider the Truckee River diversion criteria in terms of forecasting criteria and storage targets in the Lahontan Reservoir. In addition, Dr. Orlob's analysis, as contrasted with that of Mr. Binder's analysis, did not allow for uses other than irrigation

during both irrigation and non-irrigation seasons. The reported irrigation diversions, in particular for the Truckee Canal, were overstated in the Orlob report since those reported diversions included the reported stock water diversions along the Truckee Canal. In addition the analysis on coincident spills should be determined on a daily basis not on a monthly basis as was reported in the Orlob analysis. In addition, where terminal flow objectives apply, they should be applied on a year round basis and different values should have been used for them than were used by Dr. Orlob as reflected in the Binder reports. Dr. Orlob did not recognize the uncertainty of the gaging records which the court considered to be a relevant consideration in this case. In determining the total amount of waters to which the United States is entitled to recoupment, the court has given consideration to the USGS gages which are the primary method for measuring the total amount of water that was diverted into the Truckee Canal and diverted at the Carson Diversion Dam by TCID. The court has concluded that USGS gages in the Truckee Canal had an error rate of 10% to 15%. The evidence was compelling that the gages were antiquated and did not properly reflect the flows for purposes of calculating diversions to the Project and entitlement to recoupment by the United States. Because of the condition of the gages, the accuracy was impacted by backwater conditions, reverse flow conditions, uneven flow, missing measurements requiring means of estimating discharge. These conditions resulted in high readings that were not consistent with the true

flow. Therefore, the court concludes that the inherent USGS gaged error rate must be considered for the purposes of a recoupment action such as the one before this court. The court has established a 10% error rate as to fair readings and 15% as to poor readings as reflected in Bureau records for purposes of calculating the entitlements of the United States to recoupment for the relevant period in this litigation.

As to delayed spills, it was important to look at forecast information which Dr. Orlob did not do in determining whether or not the diversions that led up to the delayed spills were reasonable diversions for the events at the time. Dr. Orlob's report did not recognize unforeseen high flow events on the Carson River that could not have been predicted under normal operations. In addition, there was no recognition of the safety of dams interim operating criteria in the Orlob report and he did not consider the 1986 order regarding spreading by Judge Thompson. Finally, there was no recognition in the Orlob report of precautionary draw downs being rediverted to beneficial use.

The OCAP, as indicated previously, did not take into account the duties under the final Alpine Decree until 1985 and between 1981 and 1985 were improperly based upon the 2.92 acre-feet under the Alpine Temporary Restraining Order that was not in effect after December 18, 1980.

The record reflects that on December 18, 1980, the Alpine Decree and judgment became final. The

court concludes that the entry of the final Alpine Decree in 1980 required revisions to the 1973 OCAP. It is undisputed that the *Tribe v. Morton* court explicitly stated that the OCAP implemented by the Secretary must give proper weight to the water rights outlined in the Orr and Alpine Decrees. 354 F.Supp. at 260. The 1973 OCAP and the OCAPs that followed until 1985 were based upon the 2.92 acre-feet per acre average water duty established in the Alpine Temporary Restraining Order. After December 1980, the OCAPs did not give proper weight to the water duties in the final Alpine Decree. Under the terms of the final Alpine Decree, the water duty was set at 3.5 acre feet per acre for bottom land and 4.5 acre feet per acre for bench land.

The court concludes that the Secretary had an obligation upon the entry of the final Alpine Decree to take immediate steps to petition the decree court for a modification of the 1973 OCAP. Its failure to do so was a breach of its duty to TCID and the United States cannot now claim entitlement to diversions by TCID after 1980 under OCAPs that did not reflect water duties established in the final Alpine Decree. While the court recognizes that TCID always had available to it the right and ability to seek approval from the Orr Ditch and/or Alpine courts to divert and use or deliver more water than the amounts permitted under the 1973 OCAP, and while the court recognizes that between 1981 and 1984 there were ongoing negotiations to arrive at a settlement of the outstanding water issues involving the Tribe in the Project,

this did not excuse the United States from its obligation to make certain at all times that the OCAP in place for each year was consistent with the Orr Ditch and Alpine Decrees. After December 1980, the 288,000 acre-foot maximum allowable diversion set forth in the 1973-1980 OCAPs and carried forward in the OCAPs in 1981 to 1985 was not consistent with the final Alpine Decree. The Settlement Act expressly states in Title 2, Section 210 (b)(13): "Nothing in this title is intended to alter or conflict with any vested and perfected right of any person or entity to use the water of the Truckee River or its tributaries, including but not limited to, the rights of land owners within the Newlands Project for delivery of water of the Truckee River to Derby Dam and for the diversion of such waters at Derby Dam pursuant to the Orr Ditch Decree or any applicable law." And the *Tribe v. Morton* court expressly stated: "Nothing in this judgment and order shall constitute an interpretation or modification of either the Alpine or Orr Water Ditch decrees, nor shall it be deemed to affect the rights of any person under either of such decrees, so long as they remain in effect." *Tribe v. Morton*, 354 F.Supp. at 261.

Therefore, the court concludes that the United States and the Tribe are not entitled to recover any excess diversions after December of 1980 through the adoption of the 1985 interim OCAP which considered the duties in the final Alpine Decree against TCID. The government failed to establish that between 1981 and 1985, TCID diverted water in excess of that

authorized under the Orr Ditch Decree and the final Alpine Decree or that reasonably would have been authorized had the 1981-1985 OCAPs been properly adjusted to reflect the duties allowed under the final Alpine Decree rather than relying on the duties under the Alpine Temporary Restraining Order.

In addition, the evidence established that in 1985 and 1986 the decree court entered orders with regard to diversions by the Federal Water Master for water spreading and diversions in 1985 and 1986 that take precedence over any interim OCAPs for those years and any diversions or deliveries that occurred under court orders are not properly a part of any recoupment calculation.

The court has concluded that this judgment will run against the Truckee-Carson Irrigation District and not the individual owners of the water in the Newlands Project. The water rights up to and including the amounts set forth in the decrees belong to the Project farmers. *Nevada v. United States*, 463 U.S. at 121-6. The United States and the Tribe have failed to show that Nevada, and the individual water users including the individual members of the board of TCID named in the complaint, the intervenor defendants, or the defendant class members, received water in excess of the amounts to which they were entitled under either the Alpine or Orr Ditch Decrees or the applicable OCAPs. Whether the excess diversions of water were wasted by TCID in its management of the Project or put to beneficial use by the class members was not satisfactorily established by the plaintiff's

proof. All the United States and Tribe have shown is that the defendant TCID, in administering the Project, diverted more water than was permitted under the OCAPs between 1973 and 1981. The United States, during the course of the trial, admitted it would not attempt to prove that any individual water right owner in the Newlands Project received more water than that to which the individual was entitled under the Alpine and Orr Ditch Decrees or any applicable OCAPs. Both the United States and the Tribe have failed to meet their burden of proving liability on the part of the State of Nevada and individual water right owners and the members of the class and defendant intervenors. In addition, the United States has failed to establish that the State of Nevada or any of the individual water right owners benefited from or were unjustly enriched by the actions of the excess diversions.[1]

While the court has determined that TCID diverted waters in excess of those allowed under the provisions of the 1973 to 1981 OCAPs and is subject to an appropriate equitable order of recoupment, any recoupment plan shall not in any way impair the vested and perfected water rights of individual owners or those rights to receive up to the maximum

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[1] There was evidence that some individual water right owners purchased water in excess of the individual water user's annual decreed allocation between 1973 and 1983. However, the United States did not pursue its claims against these individuals.

amount of water allowed under the Alpine and Orr Ditch Decrees. It is clear that congress did not direct, and the United States and the Tribe did not seek, in the action before this court to recover water used by individuals in excess of decreed amounts or amounts in excess of the OCAPs. The claim of the United States in this action pursuant to the Settlement Act, is not directed against individual violations of the decrees but rather toward violations committed by TCID, in its capacity as Manager of the Reclamation Project.

Because of the long delay in bringing this action by the United States and because the United States has destroyed records that would have been helpful in the court's final assessment of diversions in this case, the court concludes that the United States should not be allowed any interest in kind.

In concluding that the OCAPs were valid and binding on TCID between 1973 through 1980, as were the 1985, 1986 and 1987 OCAPs, the court has determined that the Secretary had the authority to issue the regulations as set forth above.

In addition, the court has rejected TCID's position that the OCAPs are subject to the administrative procedure acts, notice and comment provisions. The court has also rejected TCID's counterclaims relating to unclean hands and the doctrines of waiver and estoppel. To the extent the defendant TCID or other defendants have raised other defenses, claims or counterclaims they are denied.

The court is prepared to certify this decision as a final decision on liability to enable the parties to file an interlocutory appeal if the parties desire to do so prior to consideration of any plan of recoupment. 28 U.S.C. § 1292 (2003). The court is mindful that recoupment may be difficult to order. This is because there is little evidence before the court that TCID is the record owner of any water rights that might be subject to any order of recoupment or that an order can be fashioned in a way that will not interfere with the vested and perfected rights of the class defendants.[2] If the parties do not seek an interlocutory appeal or if the Ninth Circuit Court of Appeals does not permit the appeal, the court will set further hearings on the recoupment phase of the case.

Therefore judgment shall be entered in favor of the United States and the Pyramid Lake Paiute Tribe of Indians and against the Truckee Carson Irrigation District for excess diversions in the amount of 197,152 acre-feet. Judgment shall be entered against the United States and the Pyramid Lake Paiute Tribe of Indians and in favor of the Board of Directors of the Truckee Carson Irrigation District individually, the State of Nevada through its Department of Conservation & Natural Resources, Division of Wildlife and Division of State Lands, all individual water

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[2] The Ninth Circuit Court of Appeals has previously upheld the remedy of restitution of water based on TCID's acts that were not allowed under OCAP. *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364 (9th Cir. 1989).

right owners as members of the defendant class of water right owners, and all defendant intervenors.

Dated this 3rd day of December, 2003.

/s/ Howard D. McKibben
United States District Court

UNITED STATES DISTRICT COURT

****** DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BOARD OF DIRECTORS, TRUCKEE-CARSON IRRIGATION DISTRICT, individually, and the TRUCKEE-CARSON IRRIGATION DISTRICT,

Defendants.

D. EDWIN BRUSH, TED J. deBRAGA, RICHARD HARRIMAN, ROGER MILLS, JIM PERAZZO, RAY PETERSON, and WILLIAM E. SHEPARD,

Counterclaimants,

vs.

THE UNITED STATES OF AMERICA, and BRUCE BABBITT, Secretary pf [sic] Interior,

Counterdefendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV-N-95-0757-HDM

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
DEC -9 2003
CLERK,
U.S. DISTRICT COURT

BY DEPUTY

PYRAMID LAKE PAIUTE
TRIBE OF INDIANS
Intervenors.

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XXX Decision by Court. This action came to be considered before the Court.

The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment shall be entered in favor the of the United states and the Pyramid Lake Paiute Tribe of Indians and against the Truckee Carson Irrigation District for excess diversions in the amount of 197,152 acre-feet. Judgment shall be entered against the United States and the Pyramid Lake Paiute Tribe of Indians and in favor of the Board of Directors of the Truckee Carson Irrigation District individually, the State of Nevada through its Department of Conservation & Natural Resources, Division of Wildlife and Division of State Lands, all individual water right owners as members of the defendant class of water right owners, and all defendant intervenors.

December 9, 2003

Lance S. Wilson
Clerk

Jerry Ries
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 30 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR W. BELL, IV; et al.,

Defendants,

and

BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT),

Defendant-Appellant.

No. 05-16154

D.C. No. CV-95-00757 -- HDM

U.S. District Court for Nevada, Reno

MANDATE

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ARTHUR W. BELL, IV; et al., Defendants, and BOARD OF DIRECTS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson Irrigation District, Defendant-Appellee.	No. 05-16157 D.C. No. CV-95-00757 – HDM U.S. District Court for Nevada, Reno
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTHUR W. BELL, IV; et. al., Defendants, and STATE OF NEVADA, DIVISION OF LANDS and STATE OF NEVADA, DIVISION OF WILD LIFE, Defendants-Appellants.	No. 05-16158 D.C. No, CV-95-00757 – HDM U.S. District Court for Nevada, Reno

UNITED STATES OF AMERICA, Plaintiff, v. ARTHUR W. BELL, IV; et al., Defendants, and BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson Irrigation District, Defendant-Appellee.	No. 05-16187 D.C. No. CV-95-00757 – HDM U.S. District Court for Nevada, Reno
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTHUR W. BELL, IV, Defendants, FRANCIS E. DUBOIS, III and FALLON PAIUTE SHOSHONE INDIAN TRIBE, Defendants, FREY RANCH PARTNERSHIP; et al., Defendants,	No. 05-16189 D.C. No. CV-95-00757 – HDM U.S. District Court for Nevada, Reno

STATE OF NV DIV OF L, Division of Lands; et al.,

Defendants,

TOWN OF FERNLEY and BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson Irrigation District,

Defendants,

and

PERALDO BROTHERS; ET AL.,

Defendants-Appellants,

CITY OF FALLON,

Defendant-Appellant,

CALVIN R. MOFFIT,

Defendant-Appellant,

LARRY FRITZ FAMILY TRUST,

Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTHUR W. BELL, IV; et al., Defendants, and BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson irrigation District, Defendant-Appellant.	No. 05-16909 D.C. No. CV-95-00757 – HDM U.S. District Court of Nevada, Reno

The judgment of this Court, entered April 20, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court
/S/
Theresa Benitez
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
FEB 18 2005
CLERK,
U.S. DISTRICT COURT

BY JR DEPUTY

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOARD OF DIRECTORS, TRUCKEE-CARSON IRRIGATION DISTRICT, individually, and the TRUCKEE-CARSON IRRIGATION DISTRICT,

Defendants.
/

CV-N-95-0757-HDM

Judgment

D. EDWIN BRUSH, TED J. deBRAGA, RICHARD HARRIMAN, ROGER MILLS, JIM PERAZZO, RAY PETERSON, and WILLIAM E. SHEPARD,

Counterclaimants,

vs.

THE UNITED STATES OF AMERICA, and BRUCE BABBITT, Secretary pf [sic] Interior,

Counterdefendants. /

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Intervenors. /

Pursuant to this court's decision of December 3, 2003 as clarified by this court's order of February 4, 2005 (Docket # 465), judgment is entered in favor of the United States and the Pyramid Lake Paiute Tribe of Indians and against the Truckee-Carson Irrigation District for excess diversions in the amount of 197,152 acre-feet. All individual water right owners as class defendants are bound by this judgment but shall have no independent individual liability under the judgment. This judgment imposes no individual liability against the Board of Directors of the Truckee-Carson Irrigation District or the State of Nevada through its Department of Conservation and Natural

Resources, Division of Wildlife and Division of State Lands.

The excess diversion of 197,152 acre-feet shall be repaid in full by the Truckee-Carson Irrigation District within twenty (20) years of the date of this judgment. Repayment shall be in equal annual amounts of 9857.6 acre-feet plus interest of two percent (2%) on the unpaid balance, payable each year no later than the anniversary date of this judgment unless for good cause shown and after notification and a hearing the court defers all or part of any annual repayment until the following year or years.

Repayment shall be made by the Truckee-Carson Irrigation District through reductions of diversions to the Newlands Project from the Truckee River or through water savings or reductions in demand generated by existing and proposed acquisition programs. The Federal Water Master shall have the responsibility to certify to the court each year that the Truckee-Carson Irrigation District is in compliance with this judgment. Such certification shall be made only after the Federal Water Master has conferred with the designated representatives of the Secretary of the Interior, the Pyramid Lake Paiute Tribe of Indians and the Truckee-Carson Irrigation District. The court and the Federal Water Master shall be advised of the names of such representatives within sixty days of the date of this judgment.

All of the parties shall bear their own costs and fees.

Dated this 16th day of February, 2005.

/s/ Howard D. McKibben
United States District Court

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOARD OF DIRECTORS, TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,

/

CV-N-95-0757-HDM
ORDER

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
FEB 7 2005
CLERK,
U.S. DISTRICT COURT

BY /s/ JR DEPUTY

The motion of the United States for clarification of this court's order of December 9, 2003 is granted. The order of December 9, 2003 is modified to include the following: TCID was the representative of the water users at all times that water was improperly diverted from the Truckee River during the period set forth in this court's December 9, 2003 order. While the individual water right users as class defendants shall have no individual liabilities they are bound by this court's order of December 9, 2003 and by the judgment to be entered pursuant to that order.

IT is so ORDERED.

Dated this 4th day of February, 2005.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ARTHUR W. BELL, IV; PERALDO BROTHERS; CHRISTINE L. MATLEY FAMILY TRUST; RAY CONLAN; FRANCIS E. DUBOIS, III; FALLON PAIUTE SHOSHONE INDIAN TRIBE; CITY OF FALLON; FREY RANCH PARTNERSHIP; DEBRA S. FREY; CHARLES P. FREY, jr.; CALVIN R. MOFFITT; STATE OF NV DIV OF L, Division of Lands; STATE OF NEVADA PAROLE DEPT., Division of Wildlife; STILL-WATER FARMS INC.; THE LARRY FRITZ FAMILY TRUST; TOWN OF FERNLEY,
Defendants,
and
BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT),
Defendant-Appellant.

No. 05-16154

D.C. No. CV-95-00757-HDM
U.S. District Court for Nevada, Reno

ORDER

FILED
JUN 22 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ARTHUR W. BELL, IV; PERALDO BROTHERS; CHRISTINE L. MATLEY FAMILY TRUST; RAY CONLAN; FRANCIS E. DUBOIS, III; FALLON PAIUTE SHOSHONE INDIAN TRIBE; CITY OF FALLON; FREY RANCH PARTNERSHIP; DEBRA S. FREY; CHARLES P. FREY, Jr.; CALVIN R. MOFFITT; STATE OF NV DIV OF L, Division of Lands; STATE OF NEVADA PAROLE DEPT., Division of Wildlife; STILLWATER FARMS INC.; THE LARRY FRITZ FAMILY TRUST; TOWN OF FERNLEY,

Defendants,

and

BOARD OF DIRECTS [sic] OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson Irrigation District,

Defendant-Appellee.

No. 05-161157

D.C. No. CV-95-00757-HDM
U.S. District Court for Nevada, Reno

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR W. BELL, IV; PERALDO BROTHERS; CHRISTINE L. MATLEY FAMILY TRUST; RAY CONLAN; FRANCIS E. DUBOIS, III; FALLON PAIUTE SHOSHONE INDIAN TRIBE; CITY OF FALLON; FREY RANCH PARTNERSHIP; DEBRA S. FREY; CHARLES P. FREY, Jr.; CALVIN R. MOFFITT; STATE OF NV DIV OF L, Division of Lands; STATE OF NEVADA PAROLE DEPT., Division of Wildlife; STILLWATER FARMS INC.; THE LARRY FRITZ FAMILY TRUST; TOWN OF FERNLEY,

Defendants,

and

STATE OF NEVADA, DIVISION OF LANDS and STATE OF NEVADA, DIVISION OF WILD LIFE,

Defendants-Appellants.

No. 05-16158

D.C. No, CV-95-00757-HDM
U.S. District Court for Nevada, Reno

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARTHUR W. BELL, IV; PERALDO BROTHERS; CHRISTINE L. MATLEY FAMILY TRUST; RAY CONLAN; FRANCIS E. DUBOIS, III; FALLON PAIUTE SHOSHONE INDIAN TRIBE; CITY OF FALLON; FREY RANCH PARTNERSHIP; DEBRA S. FREY; CHARLES P. FREY, Jr.; CALVIN R. MOFFITT; STATE OF NV DIV OF L, Division of Lands; STATE OF NEVADA PAROLE DEPT., Division of Wildlife; STILLWATER FARMS INC.; THE LARRY FRITZ FAMILY TRUST; TOWN OF FERNLEY,

Defendants,

and

BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson Irrigation District,

Defendant-Appellee.

No. 05-16187

D.C. No. CV-95-00757-HDM
U.S. District Court for Nevada, Reno

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR W. BELL, IV,

Defendants,

FRANCIS E. DUBOIS, III and FALLON PAIUTE SHOSHONE INDIAN TRIBE,

Defendants,

FREY RANCH PARTNERSHIP; DEBRA S. FREY; CHARLES P. FREY, Jr.;

Defendants,

STATE OF NV DIV OF L, Division of Lands; STATE OF NEVADA PAROLE DEPT., Division of Wildlife; STILL WATER FARMS INC.,

Defendants,

TOWN OF FERNLEY and BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson Irrigation District,

Defendants,

and

No. 05-16189

D.C. No. CV-95-00757-HDM
U.S. District Court for Nevada, Reno

PERALDO BROTHERS; CHRISTINE L. MATELY FAMILY TRUST; RAY CONLAN,

Defendants-Appellants,

CITY OF FALLON,

Defendant-Appellant,

CALVIN R. MOFFIT,

Defendant-Appellant,

LARRY FRITZ FAMILY TRUST,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR W. BELL, IV; PERALDO BROTHERS; CHRISTINE L. MATLEY FAMILY TRUST; RAY CONLAN; FRANCIS E. DUBOIS, III; FALLON PAIUTE SHOSHONE INDIAN TRIBE; CITY OF FALLON; FREY RANCH PARTNERSHIP; DEBRA S. FREY; CHARLES P. FREY, Jr.; CALVIN R. MOFFITT; STATE OF NV

No. 05-16909

D.C. No. CV-95-00757-HDM U.S. District Court of Nevada, Reno

DIV OF L, Division of Lands; STATE OF NEVADA PAROLE DEPT., Division of Wildlife; STILLWATER FARMS INC.; THE LARRY FRITZ FAMILY TRUST; TOWN OF FERNLEY,

Defendants,

and

BOARD OF DIRECTORS OF TCID (TRUCKEE IRRIGATION DISTRICT), Truckee-Carson irrigation District,

Defendant-Appellant.

Before: SCHROEDER and BERZON, Circuit Judges, and SHADUR*[1], Senior District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Schroeder and Berzon have voted to deny the petition for rehearing en banc, and Judge Shadur has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote

[1] The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

CONSTITUTION FOR THE UNITED STATES OF AMERICA

Article. I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 125. PENDING ACTIONS AND JUDGMENTS

28 USCS § 1961

§ 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[.] the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

TITLE 43. PUBLIC LANDS

CHAPTER 12. RECLAMATION AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT GENERAL PROVISIONS

§372. Water right as appurtenant to land and extent of right

The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Truckee-Carson Pyramid Lake Water Rights Settlement Act of 1990

Pub. L. No. 101-618, 104 Stat. 3294, Nov. 16, 1990

Sec. 201. Short Title

This title may be cited as the "Truckee-Carson-Pyramid Lake Water Rights Settlement Act."

Sec. 209. NEWLANDS PROJECT IMPROVEMENT.

(j) OPERATING CRITERIA AND PROCEDURES –

(1) In carrying out the provisions of this title, the Secretary shall act in a manner that is fully consistent with the decision in the case of Pyramid Lake Paiute Tribe of Indians v. Morton 354 F. Supp. 252 (D.D.C. 1973).

(2) Notwithstanding any other provision of law, the operating criteria and procedures for the Newlands Reclamation Project adopted by the Secretary on April 15, 1988 shall remain in effect at least through December 31, 1997, unless the Secretary decides, in his sole discretion, that changes are necessary to comply with his obligations, including those under the Endangered Species Act, as amended. Prior to December 31, 1997, no court or administrative tribunal shall have jurisdiction to set aside any of such operating criteria and procedures or to order or direct that they be changed in any way. All actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid and shall not be subject to review in any judicial

or administrative proceeding, except as set forth in paragraph (3) of this subsection.

(3) The Secretary shall henceforth ensure compliance with all of the provisions of the operating criteria and procedures referenced in paragraph (2) of this subsection or any applicable provision of any other operating criteria or procedures for the Newlands Project previously adopted by the Secretary, and shall, pursuant to subsection 709(h) or judicial proceeding, pursue recoupment of any water diverted from the Truckee Rive [sic] in excess of the amounts permitted by any such operating criteria and procedures. The Secretary shall have exclusive authority and responsibility to pursue such recoupment, except that, if an agreement or order leading to such recoupment is not in effect as of December 31, 1997, any party with standing to pursue such recoupment prior to enactment of this title may pursue such recoupment thereafter. Any agreement or court order between the Secretary and other parties concerning recoupment of Truckee River water diverted in violation of applicable operating criteria and procedures shall be consistent with the requirements of this subsection and the Endangered Species At [sic], as amended, and shall be submitted for the review and approval of the court exercising jurisdiction over the operating criteria and procedures for the Newlands Project. All interested parties may participate in such review. In any recoupment action brought by any party, other than the Secretary. after December 31, 1997. The only relief available from any court of the

United States will be the issuance of a declaratory judgment and injunctive relief directing any unlawful user of water to restore the amount of water unlawfully diverted. In no event shall a court enter any order in such a proceeding that will result in the expenditure of any funds out of the United States Treasury.

SEC. 210. MISCELLANEOUS PROVISIONS.

(b) GENERAL PROVISIONS.

(13) Nothing in this title is intended to affect the power of the Orr Ditch court or the Alpine court to ensure that the owners of vested and perfected Truckee River water rights receive the amount of water to which they are entitled under the Orr Ditch decree or the Alpine decree. Nothing in this title is intended to alter or conflict with any vested and perfected right of any person or entity to use the water of the Truckee River or its tributaries, including, but not limited to the rights of landowners within the Newlands Project for delivery of the water of the Truckee River to Derby Dam and for the diversion of such waters at Derby Dam pursuant to the Orr Ditch decree or any applicable law.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALPINE LAND & RESERVOIR COMPANY, a corporation, et al.

Defendants. /

Civil No. D-183 BRT

ENTERED
DEC 18 1980
CLERK
BY OPHELIA ROBEY

FINAL DECREE

FINDINGS OF FACT, CONCLUSIONS OF LAW, TABULATION AND ADMINISTRATIVE PROVISIONS

FINDINGS OF FACT

I. This Court has jurisdiction over the subject matter and the parties to this proceeding.

II. The Carson River and its tributaries are interstate streams and the waters of the Carson River and its tributaries are fully appropriated.

III. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the home-stead laws in accordance with the provisions of the Act, the lands required for the government's first reclamation project, now known as the Newlands Project.

IV. The United States has diligently proceeded with the construction of the Newlands Project and has expended over Six Million Dollars ($6,000,000) in that construction. The works so constructed have been used for many years for the storage of Carson River water and the distribution thereof to Project lands. The principal structure of the Project is the Lahontan Reservoir which was completed at a cost of approximately One Million Four Hundred Thousand Dollars ($1,400,000). Lahontan Reservoir has a capacity of 295,149 acre-feet to the spillway crest. With 20 inch flashboards on the crest, the capacity is 317,890 acre-feet. The lands of the Newlands Project irrigated or susceptible of irrigation by the waters of the Carson River and its tributaries include 80,000 acres of cultivable lands, 50,000 acres of pasture lands, and 7,500 acres of land in the Truckee Division of the Project.

V. There existed prior to July 2, 1902 certain vested rights, owned by old-time settlers in Churchill County, in and to the use of waters of the Carson River and its tributaries. The United States, subsequent to July 2, 1902, acquired the right, title and interest of these owners in the waters, ditches, dams, and other irrigation facilities and structures and in return agreed to construct water storage and distribution facilities and to deliver certain waters to these owners.

VI. Prior to July 2, 1902, there existed under the ownership of Frank W. Inman and his wife the right to divert 40 c.f.s of water of the Carson River

with a priority of 1882 for the purpose of producing power. On February 12, 1912, Frank W. Inman and his wife executed an agreement conveying this power right to the United States.

VII. The United States possesses Trust Patents to five riparian rights on the West and East Forks of the Carson River in Alpine County, California, in favor of the following five beneficiary Indians of the Washoe Tribe, in the acreage as specified:

Name	Acreage
Dr. Bob	1.40
Hattie Miller (Cow Bitch)	19.73
Molly's Pete	16.40
Maggie James	4.40
GO-DAH-DIC-PETE	8.25

VIII. The lands on which the waters of the Carson River and its tributaries are used lie in an arid region of the United States; to make these lands productive, irrigation thereof is necessary; these lands vary widely in texture, porosity, terrain, inclination, vegetation, crop use, sub-surface stratas and other facts which affect the amount of water necessary to irrigate different portions of said lands and further affect the amount of water which is returned to the main course by drainage and other means; the various areas require, for proper irrigation and crop productivity varying quantities of water per acre. In the Newlands Project, the water duties are 3.5 acre-feet per acre delivered to the land for the bottom-land and 4.5 acre-feet per acre delivered to the land for the

bench land. In the lands above the Newlands Project the water duties are 4.5 acre-feet per acre diverted to the canal for the bottom-lands, 6.0 acre-feet per acre diverted to the canal for the alluvial fan lands and 9.0 acre-feet per acre diverted to the canal for the bench lands. The water duties assigned for the various categories of the lands are the total duties from whatever source of surface water.

The net consumptive use of surface water for irrigation on the Newlands Project is 2.99 acre-feet per acre. The net consumptive use of surface water for irrigation of the lands above the Lahontan Reservoir is 2.5 acre-feet per acre.

IX. The Carson River and its tributaries are divided into eight segments:

Segment 1: The East Fork of the Carson River from the California/Nevada state line up to the headwaters of the East Fork in the mountains.

Segment 2: The East Fork of the Carson River from the California/Nevada state line to the confluence of the East and West Forks of the Carson River.

Segment 3: The West Fork of the Carson River from the gauge at Woodfords, California upstream to the headwaters in the mountains.

Segment 4: The West Fork of the Carson River from the gauge at Woodfords to the California/Nevada State line.

Segment 5: The West Fork of the Carson River (and Brockliss Slough) between the California/Nevada state line and the confluence of the East and West Forks of the Carson River.

Segment 6: The main stream of the Carson River from the confluence of the East Fork, West Fork, and Brookliss [sic] Slough to the gauge at Carson City.

Segment 7: The main stream of the Carson from the Carson City gauge to the Lahontan reservoir. This segment is further subdivided for administration into autonomous subsegments:

(a) Mexican Ditch, Dayton and the reach between Rose Ditch and Cardelli Ditch, inclusive;

(b) Gee Ditch;

(c) Koch Ditch;

(d) Houghman and Howard Ditches;

(e) Buckland Ditch.

Segment 8: The area below the Lahontan Dam.

X. The historic practices, customs, agreements and decrees followed by the water users and the

Federal Water Master on the Carson River and its tributaries:

1. *General*:

(a) The Watermaster shall begin to direct the distribution of water on such date that he determines there is not enough water in the Upper Carson River to serve the most junior priority.

(b) When such distribution begins, the water users are notified that the river is on regulation and diversions will be monitored.

(c) Subject to the exceptions described below, the water is distributed on the basis of priority and acreage.

(d) For purposes of distribution, the river is administered in segments in accordance with established practices, customs, agreements and decrees.

(e) When river is on regulation each segment of the river is treated autonomously.

(f) The high alpine reservoirs on both forks of the river are filled out of the priority order. This is done because the snow does not melt sufficiently at those high elevations to fill the reservoirs until the summer when the river flow has already begun to diminish down in the valley.

(g) On all segments of the river, rotation is practiced so as to serve the junior priorities as long as possible.

(h) On both the East Fork and the West Fork, any user, regardless of his priority, who does not need the water does not get it. If the user has a need for it, he gets the water under his priority; if he does not have a need for it, the water goes to the next junior priority.

2. *Segment 1*:

Since this segment consists largely of riparian lands, there are no relevant customs and the Water Master exercises little supervision except to regulate the release of water from the Alpine Land and Reservoir reservoirs. Water in these reservoirs is represented by corporate stock and is rented, traded and sold to any landowner.

3. *Segment 2*:

(a) When the flow rate at the Gardnerville gauge reduces to 200 cubic feet per second, ⅓ of the river flow is directed into the Allerman Canal and ⅔ of the flow 'stays in the river. The point of measurement for the ⅓-⅔ split is at a weir located 100 feet downstream of the intersection of Highway 395 and the Allerman Canal. Water users on the Heybourne Tract served by the Allerman Canal, the upper New Virginia, Company and Cottonwood ditches hire a ditch rider to assist, under the direction of the Water Master, in the distribution of water.

(b) Reservoirs 1, 2 and 4 of the Dangberg lands are filled 3 times yearly. The reservoirs are filled once in February and March pursuant to their

storage rights. The reservoirs are filled twice later in the year as a means of regulating the water flow in the Virginia and Allerman ditches and ensuring sufficient irrigation head during periods of peak irrigation demand.

(c) Most diversions in this and the other segments are based upon a two-week irrigation interval. The similar canals such as the Peter Heitman, Berning, Christensen-Hussman, Madison or Topping No. 1 and Topping No. 2 divert for several days on a two-week interval. Other larger canals and sloughs divert on a continuous basis and individual ditches and laterals coming off these larger canals will be on the two-week rotation. Canals and sloughs that divert continuously are the Allerman Canal, Upper New Virginia, Rocky Slough, Henningsen System, Stodieck, St. Louis Straight, Homestream, Company, Cottonwood and Williams Slough.

The continuous diversion made by the St. Louis Straight and island portion of Homestream will be stopped and transferred to the Allerman Canal when the ⅓-⅔ split takes place.

(d) When the East Fork goes on regulation, the Cottonwood Slough is used to convey water downstream to the Williams Slough diversion rather than using the main channel of the East Fork.

4. *Segment 3*:

This segment on the West Fork consists largely of riparian lands and the Water Master

exercises little supervision except to regulate the release of water from the mountain reservoirs for downstream use. Traditionally the water stored in the mountain reservoirs has not been considered appurtenant to any particular place of use.

5. *Segment 4*:

(a) The Anderson-Bassman Decree, Exhibit 16, provides that beginning the first Monday in June and continuing to the ends of the irrigation season the available water supply is rotated on a weekly basis between Segment 4 and Segment 5. This custom applies to all water users on these two segments, not just the original parties to the Anderson-Bassman lawsuit or their successors in interest.

(b) The Price Decree, Exhibit 18, and the 1941 Agreement, Exhibit 19, control the rotation among the Segment 4 users during the week that Segment 4 has water under the Anderson-Bassman Decree.

(c) During the non-irrigation season, diversions are made by the Snowshoe Thompson No. 2 ditch via Indian Creek to store water in the Mud Lake Reservoir.

6. *Segment 5*:

(a) As mentioned above, this segment's diversions are made according to the weekly rotation schedule with Segment 4 as the first Monday in June.

(b) During Segment 5 week the water is allocated according to priorities. During Segment 4 week, any Segment 5 junior appropriators who did not get direct flows during Segment 5 week are allowed to use the return flows from Segment 4.

(c) The Dresslers usually bring their alpine stored waters down during the Segment 5 week but Bruns and Gansberg usually bring their Lost Lake water down during Segment 4 week.

(d) The water stored in Mud Lake Reservoir is sometimes released to downstream users in exchange for direct diversion that would normally go to those downstream users.

(e) Brockliss Slough, starting in the vicinity of Dressler Lane, carries West Fork water drainage down to the confluence of Brockliss Slough and the East and West Forks. During times of short supply in Brockliss Slough, the use of water is rotated among the three oldest priorities; a second rotation is observed among the other priorities.

(f) Drainage water is occasionally diverted from the old West Fork into Brockliss Slough and then to lands west of Brockliss Slough.

(g) Due to the destruction of the Jones Company West ditch by flood, the lands formerly irrigated from that ditch are now served with return waters from Bull Slough. Bull Slough also receives return flows from irrigation using mountain creeks not considered tributaries of the Carson.

(h) Some rights which appear to be served upon the West Fork water are actually served with East Fork water which, after being used to irrigate East Fork lands, drains into the West Fork channel. These lands are generally those in between Squires Ditch and the Muller-Bartels dam on the West Fork.

(i) Water taken out of the East Fork through Rocky Slough and into Edna Ditch and other small ditches is used to irrigate lands between the East Fork and the West Fork.

7. *Segment 6*:

The diversions in this segment occur by pumping from the river. When the main stream is on regulation, the amount of water that gets to each pump is sufficient to satisfy that priority. As a result, and because of the high cost of regulation in comparison to benefits, the Water Master makes no attempt to regulate in this segment unless a controversy arises.

8. *Segment 7*:

Due to the intermittent nature of the river's surface flow, appearing upstream and disappearing downstream from various diversion structures, this segment is regulated in autonomous subsegments.

9. *Segment 8*:

There are no relevant practices or customs in this segment and the Water Master only regulates when a controversy arises.

XI. The California riparian landowners are entitled to the riparian water rights permitted under California law.

XII. For proper administration of the respective rights of the parties in this action, it is necessary and proper that general administrative provisions be incorporated in this Decree and that a Water Master be appointed to carry out the provisions of the Decree.

XIII. The parties, persons, corporations, intervenors, grantees and substituted parties named in the following tabulation, and their successors-in-interest and assigns, constitute and are the only appropriators, riparian owners and users of the waters of the Carson River and its tributaries. The sole class of exceptions to the foregoing statement is the landowners on the Newlands Project who took land patents from the United States. Each such landowner is the owner of an appurtenant water right for the patented land as discussed in the opinion filed in this case. The Court has not been provided with a tabulation of these owners and their irrigated acreages. As to the future tabulation of these details, see Administrative Provision VI. All of the above-mentioned parties and their successors and assigns are the owners of water rights to the waters of the Carson River and its tributaries for the legally

described acreages or places of use and with the listed priority dates, all contained in the following tabulation.

CONCLUSIONS OF LAW

I. The parties hereto are entitled to a Decree in this action adjudging and declaring that they are the owners and entitled to use the rights set forth in the following tabulation.

II. In accordance with the Findings of Fact and Conclusions of Law, IT HEREBY IS ORDERED, ADJUDGED, AND DECREED as follows:

That the parties, intervenors, grantees, successors in interest and assigns are, and each of them hereby is, as against every party to this action, adjudged to be owners of the water rights hereafter specified and set forth and entitled to divert, store and use from the Carson River and its tributaries and from the streams and springs hereafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs for the irrigation of their respective lands as described in the tabulation, for generating power, for municipal purposes, for supplying the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the amounts discussed in the previous sections on water duty, subject and according to the respective priority dates and riparian ownership stated below and the

historic customs, practices, agreements and decrees discussed above.

All points of diversion and places of use are described with references to the Mount Diablo Base and Meridian. Where an entity owns multiple water rights, that entity is listed at the beginning of a series of water rights from a particular diversion ditch and is not repeated for each place of use. Similarly, if a series of places of use under the same owner all have the same priority date, that date is listed once on the first line of the series and is not repeated for each place of use. The only exception to this system is the tabulation of the water rights in Segment 4, where the Special Master listed the places of use for each owner and then gave total acreages for the relevant priority dates. The listing of owners is correct only insofar as the current information has been supplied to the Court. Any grantees, assignees or successors in interest should contact the Water Master with proof of chain of title.

Acreages and priorities are established in conformity with the evidence taken before the Special Master. Any changes of place or manner of use or point in diversion which have been since approved in the manner provided by the Temporary Restraining Order and Special Master's Report shall be recognized and recorded by the Water Master.

RIGHTS OF THE UNITED STATES OF AMERICA

The rights of the United States of America in and to the waters of the Carson River, other than those rights held by the United States as trustee for certain Indians tabulated above are the following:

1. The United States is entitled to divert and store the entire flow of the Carson River as it reaches the Lahontan Dam for distribution to the individual farmers on the Project who own the water rights appurtenant to their lands and for generating power.

2. The United States is entitled to divert into Lahontan Reservoir, with a priority of 1882, 40 c.f.s. for generating power. Any power generation at either the Lahontan or V canal power plants shall be incidental only to releases or diversions of water for beneficial consumptive uses, except that power may be generated from water that would otherwise constitute uncontrollable spill or precautionary drawdown.

3. Tabulation of the Vested Rights Acquired by Contract.

Claim Number	Names of Ditches and Locations of Diversions-Downstream	Owner	Priority	Former Irrigate Acres	Current Place of use
826	Lahontan Dam	United States	1865	97	Lahontan Reservoir for fishing and recreation (Dutch Bill right)
827			1868	194	
828			1873	265	
829			1875	1637	
830			1876	994	
			1876	600	
831			1877	970	
832			1878	10714	
833			1879	737	
834			1880	2929	
835			1881	133	
836			1882	285	
837			1883	120	
838			1884	212	
839			1885	349	
840			1886	2336	
841			1887	245	
842			1888	240	
843			1889	95	
844			1890	2756	
845			1891	433	
846			1892	49	
847			1893	145	
848			1894	424	
849			1895	1215	
850			1896	453	
851			1897	500	
852			1898	124	
853			1899	159	
854			1900	277	
855			1901	317	
856			1902	478	

ADMINISTRATIVE PROVISIONS

I. Without the application of water, the lands described above are dry and arid and irrigation is necessary for the production of valuable crops thereon. The respective amounts of water stated above to have been appropriated for or used on these lands, are, in each instance, the maximum amount necessary and sufficient for the reasonable and economical irrigation of crops thereon.

II. The above-named parties who have appropriated water for irrigation have also used and are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes. The priority in respect to the use of water for livestock and domestic purposes shall be identical to the priority of that party's irrigation right.

III. The parties, intervenors, grantees, successors in interest and substituted parties, assigns and each of their servants or agents and all persons claiming by, through or under them in or to the water rights or lands above described are, and each of them is hereby, until otherwise ordered, restrained from asserting or claiming, except in this action, any right in or the waters of the Carson River or its tributaries, or the waters of any of the creeks or streams or other waters mentioned above except in accordance with the rights specified, determined and allowed by this Decree.

All claimants or potential claimants mentioned in the above paragraph are as well hereby, until otherwise ordered by the Court, restrained and enjoined from diverting, taking or interfering in any way with the waters of the Carson River or its tributaries, including creeks, streams and springs, so as to in any way prevent or interfere with the diversion, use and enjoyment of the water of any of the persons or parties as allowed by this Decree, having due regard to the relative priorities and historic practices recognized in this Decree. All claimants or potential claimants mentioned in the above paragraph are hereby enjoined and restrained from taking, diverting or using any of the water allowed to them, in any manner or any time while this Decree remains in force so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree (subject to this Decree's provisions on segmentation of the river) until such persons or parties having prior rights have received for their use the waters hereby allowed to them.

IV. The quantities of water to be diverted by the owners the several ditches, through those ditches, on account of the several priorities herein allowed, are allowed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required for actual, reasonably economical beneficial use. Rotation, or the combining and exchanging of the use of water between ditches and among users shall be permitted at all times and shall be required whenever

necessary in order to obtain reasonable economy in use of the water of the river or its tributaries, or in order to give each ditch or user a more advantageous irrigation head, provided that such rotations shall not injuriously affect any of the rights determined and allowed by this Decree. The Water Master may direct such rotations after consultation with the various interested water users.

V. This Decree does not and shall not in any way affect the title to rights in any property other than the rights to the diversion and use of water as herein stated and allowed. In the cases where this Decree allows water to be diverted through any ditch by the ditch owner on behalf of another party, the conditions of any contractual relations existing between them are not hereby determined.

VI. A Water Master shall be appointed by this Court to carry out and enforce the provisions of this Decree and the instructions and orders of this Court. If any proper order, rule or direction of the Water Master, made in accordance with and for the enforcement of this Decree, is disobeyed or disregarded, he is empowered and authorized to cut off the water from the ditch or canal owners who disobey or disregard the order, rule or direction. If such a cutoff should occur the Water Master shall promptly report to the Court his actions and the circumstances surrounding the case.

When the Court deems is necessary, the Court shall authorize the employment by the Water

Master of assistants so as to properly carry out the provisions of this Decree and the orders of the Court. The term of employment, expense and compensation of the Water Master and his assistants, the payments and means and methods of securing funds to pay the same, shall be fixed by orders of the Court from time to time. Any person feeling aggrieved by any action or order of the Water Master may, in writing and under oath, complain to the Court, after service of a copy of the complaint on the Water Master. The Court shall promptly review the action or order and make such order as the circumstances warrant.

All disputes on the Carson River system involving the existence or ownership of water rights, the distribution of water or the transportation or measurement of water shall first be submitted to the Water Master for determination as a jurisdictional prerequisite to any complaint to the Court for relief.

The Water Master shall establish a file system for the water rights on the Carson system. The files will be numbered to correspond to the claim numbers set forth in this Decree and subdivided as may become necessary according to future ownership changes. The Water Master must be notified by the parties when title to a water right is changed and proof of the change of title must be provided to the Water Master. The Water Master shall not be required to deliver water to any new owner unless this provision is complied with. The file system shall be extended to include the Newlands Project farmlands only when the lands are sold or transferred or the

water rights are sold or transferred. In each such instance the Water Master shall not be required to deliver water to the new owner until the Water Master's office has been informed of the transfer and proof of title going back to the original United States patent has been supplied.

The party in interest shall provide the Water Master with a copy of either the approved application by the State Engineer or this Court's order where requests for changes in the place of diversion, place of use or manner of use are approved. The Water Master is not required to recognize such changes unless and until provided with the order or approved application.

VII. Applications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer. Any person feeling himself aggrieved by any order or decision of the State Engineer on these matters may appeal that decision or order to this Court. Proceedings for review of a decision or order by the State Engineer must be commenced within 30 days of the rendition of the order or decision.

No such appeal proceedings will be heard by this Court unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the appellant's interests, has been served upon the State Engineer, personally or by registered or certified mail, at his office at the State Capitol within 30 days of the rendition of the decision

or order in question. A similar notice must also be served personally or be registered or certified mail upon other persons who are affected by the order or decision. A bond shall not be required unless a stay is requested. The decision of the State Engineer shall be prima facie correct, and the burden of proof shall be upon the party challenging the Engineer's decision. Change of manner of use applications from use for irrigation to any other use and changes in place of use applications shall be allowed only for the net consumptive use of the water right as determined by this Decree.

Applications for changes in the place of diversion, place or use or manner of use as to the California or as to both California and Nevada shall be made directly to this Court in accordance with the regular rules of procedure and notice must be served on all affected interests.

VIII. The owner or owners of each ditch or canal now or hereafter authorized to directly divert water from the Carson River or any of its tributaries, shall, at his, its, or their own expense, install and maintain in the ditch or canal, a reliable, sufficient and easily operated regulating head-gate, to be approved by the Water Master, whereby the water diverted into said ditch or canal may be regulated. The owner or owners of any such ditch or canal shall have two years from the date of entry of this Decree to fulfill this provision.

Those users who receive water from any particular ditch or canal shall allocate the installation costs of these devices among themselves in proportion of any user's water right acreage to the total water right acreage served by the ditch or canal. In this way the owner or owners of each canal or ditch shall receive proportionate contribution from all those users who benefit from the use of the ditch or canal, whether by use of the direct flows or by use of the return flows. Upon failure of any owner or owners of any such ditch or canal to install these devices within the prescribed time, the Water Master, upon ten days' notice, may cut off the water from any such ditch or canal until the required devices are installed and maintained. Upon the failure of any user to contribute his fair and proportionate share of the cost to the owner or owners of any canal or ditch, the Water Master, upon ten days' notice, may cut off that user's water until the contribution has been made.

IX. The stored water of any reservoir may be turned into and carried in the channel of any natural stream and mingled with the natural waters and diverted therefrom for the proper uses of the persons or parties entitled thereto. The Water Master, upon timely notice, shall so regulate the headgates along the streams and do and direct such other things as may be needful to transport such stored water and deliver the same to the person or persons entitled thereto. All persons are hereby prohibited from in any way interfering with any such stored water while the

same is being legally carried to the persons or parties entitled thereto.

X. No user entitled to the use or water under this Decree shall be allowed to divert more than 40% of his total entitlement in any one calendar month.

XI. Whenever any of the parties hereto, or their successors or assigns as the owners of any of the water rights hereby fixed and allowed, is not receiving the amount of water to which he or they are entitled under this Decree, he or they may request the Water Master to distribute the water in accordance with the terms of this Decree, and the Water Master, either personally or by his assistant, may thereupon enter the lands of any and all parties and persons having rights designated in this Decree and of their successors in interest, and shall regulate their, or any of their headgates, ditches and other works used for the diversion and application of such waters so as to apportion the waters as provided in this Decree.

XII. Each party shall bear his or its own costs herein incurred.

XIII. The Court hereby expressly reserves jurisdiction to modify, amend, eliminate, add to or change any provision of this Decree.

DONE IN OPEN COURT this 28th day of October 1980.

/s/ Bruce R. Thompson
UNITED STATES
DISTRICT JUDGE

In the District Court
of the United States
in and for
The District of Nevada

– IN EQUITY, DOCKET No. A $_3$ –

The United States of America

Plaintiff

– VS. –

Orr Water Ditch Company, et al.

Defendants

FINAL DECREE

FINAL DECREE

This cause having been heretofore heard by the Court and, following argument by counsel, the matter having been referred to George F. Talbot, as Special Master, and the said Special Master having thereafter rendered his report and made his findings, and the same having been approved and adopted by the Court (except as disallowed or modified by the Court) by a certain order termed "Temporary Restraining Order" made and entered in said cause under date of February 13, 1926:

NOW, THEREFORE, in accordance therewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplying the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed.

TRUCKEE RIVER DIVERSIONS
Government Rights
INDIAN DITCH

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use

and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14, 742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cubic foot per second per acre for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregate number of acres of this land being irrigated during that year, and

further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2 In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for irrigation of 2745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

DERBY DAM AND TRUCKEE CANAL

Claim No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW 1/4 of Section 19, in T. 20, N., R. 23. E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government has expended for this $6,252,000.00.

The lands so withdrawn for reclamation are naturally dry and arid and without application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

LAKE TAHOE STORAGE

Claim No. 4. Under the Reclamation Act and for irrigation and other beneficial uses on lands under said project and on lands within the basins of the Truckee, Carson and Humboldt rivers in Washoe, Storey, Lyon, Churchill and Humbolt counties, in the State of Nevada, and pursuant to notice posted, by

direction and authority of the Secretary of the Interior and for and on behalf of the United States, on the right bank of the Truckee River at the site of the dam in said river near Tahoe City and in Placer County, California, and about 500 feet downstream from Lake Tahoe, on the 21st day of May, 1903, plaintiff is entitled to, and is allowed with a priority of that date and during all seasons of the year, to have flow into and to hold and store in Lake Tahoe and in a reservoir made of said lake by a dam at said site in said river constructed with the spillway crest thereof six feet above the floors of the flow-ways of said dam as then existing, all waters of or coming into said river or said lake, both surface and under flow, to the extent of 3,000 cubic feet per second and to the extent of the capacity of said lake as a reservoir made by said dam, to said height and subject to the continuous out-flow through said river from said lake or reservoir so made by said lake or dam, of such an amount of water as plaintiff may desire to release or may discharge from said lake or reservoir not exceeding at any time a flow of 3,000 cubic feet of water per second.

In addition to the above specified rights, the United States is entitled to store, discharge and control water in Lake Tahoe as provided in the judgment and decree filed and entered on June 4, 1915, in the case of the United States, plaintiff, versus The Truckee River General Electric Company, a corporation defendant, in the District Court of the United States in and for the Northern District of California,

Second Division, and subject to said decree the United States shall be entitled to discharge from Lake Tahoe an amount of water sufficient to deliver to the head of the Truckee Canal at the Derby dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allowed at will to release and discharge any of the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other water to which it is entitled, according to its priority, through the Truckee River to the Derby Dam and there divert the same through the Truckee Canal for irrigation, for storage in the Lahontan Reservoir, for generating power and for other purposes. The rights of said defendant Sierra Pacific Power Company (formerly The Truckee River General Electric Company) under said judgment and decree are hereby recognized and confirmed.

Power Ditches
FARAD PLANT

Claim No. 5. The Sierra Pacific Power Company, a corporation owner, is entitled an dallowed [sic] to divert at all times from the Truckee River through the Farad Power Flume, which has its intake on the north bank of the Truckee River in the S 1/2 of Lot 6 in the NW 1/4 of Section 30, Township 18 North, Range Eighteen East, sufficient water, with a priority of the year 1899, to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver,

after transportation loss, to the wheel of said plant, 75 cubic feet of water per second, said plant being situate in the SE 1/4 of Section 12, Township 18 N.R. 17 E., for the generation of electric power in said plant.

FLEISH PLANT

Claim No. 6. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Fleish Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE 1/4 of Section 6, Township 18, N.R. 18 E., sufficient water with a priority of February 16, 1904, to deliver, after transportation loss, to the wheel of the Fleish Hydro-Electric power plant, 327 cubic feet of water per second, said plant being situate in the NE 1/4 of the SE 1/4 of Section 30, Township 19 N. R. 18 E., for the generation of electronic power in said plant.

VERDI PLAINT

Claim No. 7. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Verdi Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE 1/4 of the SE 1/4 of Section 19, T. 19 N. R. 18 E.. sufficient water, with a priority of October 21, 1909, to deliver, after transportation loss, to the wheel of the Verdi Power Plant 399 cubic feet of water per second, said

plant being situate in the SE 1/4 of Section 8, T. 19 N. R. 18 E. for the generation of electric power in said plant.

In addition to such diversion for power purposes, Sierra Pacific Power Company, a corporation, is allowed to divert from said river through the Verdi Power Ditch 220 inches or 5.50 cubic feet of water per second for supplying the Katz Ditch for irrigation to the extent and with the priority hereinafter allowed to this company, for the Katz Ditch under irrigation rights.

In addition to such diversions for power purposes and for so supplying the Katz Ditch with water irrigation, Sierra Pacific Power Company, a corporation, is entitled and allowed to divert and transport from the Truckee River, through the Verdi Power Ditch and Flume and to deliver to Verdi Lumber Company, a corporation, and Verdi Lumber Company is entitled to have diverted from said river through said ditch and flume by, and to receive from the Sierra Pacific Power Company, 100 inches of water with a priority of the year 1894 for supplying and maintaining the log pond of the Verdi Lumber Company in the Town of Verdi, and for logging and saw mill purposes.

WASHOE PLANT

Claim No. 8. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the

Washoe Power Ditch and Flume, which has its intake on the south bank of the Truckee River, in the NW 1/4 of the NW 1/4 of Section 16, T. 19 N. R. 18 E. sufficient water, with a priority of October 27, 1902, to deliver, after transportation loss, to the wheel of the Washoe Hydro-Electric Power Plant 396 cubic feet of water per second, said plant being situate in the SW 1/4 of the SW 1/4 of Section 14, in said township and range, for the generation of electric power in said plant.

Of the water so allowed to be diverted through the Washoe Power Ditch and Flume, Sierra Pacific Power Company is allowed to use during the irrigation season 12.4 inches or .31 cubic feet of water per second, not exceeding a seasonable amount of 50 acre feet for the irrigation of 12.4 acres of its land as hereinafter described and provided under Washoe Power Ditch under irrigation rights.

Also of the amount of water allowed to be diverted through the Washoe Power Ditch, Sierra Pacific Power Company is entitled and allowed to deliver to the defendant Leonidas Fredrick Johnson and he is entitled and allowed to have and receive from Siera Pacific Power Company, 50 inches or 1.25 cubic feet of water per second, to the seasonal amount of 257 acre feet, for the irrigation of his lands as described and as provided hereinafter under Washoe Power Ditch under irrigation rights.

RENO PLANT

Claim No. 9. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Reno Power Ditch and Flume, which has its intake on the south bank of the Truckee River 1365 feet north, 35 degrees west from Quarter Section corner between Section 15 and 16, T. 19 N. R. 19 E. sufficient water with a priority of March 31, 1891, to deliver, after transportation loss, to the wheel of the Reno Hydro-Electric Power Plant, 250 cubic feet of water per second, and sufficient additional water with a priority of November 1, 1909 to deliver after transportation loss, to the wheel of said plant 46 cubic feet of water per second, said plant being situate in NE 1/4 of NE 1/4 Section 15, in said township and range, for the generation of electric power in said plant.

In addition to such allowed diversions for power purposes through the Reno Power Ditch and Flume, Sierra Pacific Power Company is entitled and allowed to divert from the Truckee River and convey through said ditch and flume and deliver to defendants Sarah McClure, James Murray, William Murray and Sam Murray and their successors, and they are entitled and allowed to have and receive from said company, 50 inches of water for the irrigation of their lands as hereinafter described and provided under Indian Flat Ditch under irrigation rights.

RIVERSIDE MILL DITCH

Claim No. 10. The Riverside Mill Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Riverside Mill Ditch and Flume, which has its intake on the north bank of the Truckee River at a point 84 feet westerly from the center of Chestnut Street in the City of Reno and the NW 1/4 of the SE 1/4 of Section 11, T. 19, N., R. 19, E., 70 cubic feet of water per second with priority of May, 1863, for operating the Riverside Flour Mill in the City of Reno and for generating power and for milling purposes.

WADSWORTH POWER PLANT
(Solicitor: James T. Boyd)

Claim No. 13. The Wadsworth Light and Power Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Wadsworth Light and Power Company Ditch, which has its intake on the north bank of the Truckee river in the NW 1/4 of the SW 1/4 of Section 13, T. 20, N., R. 23, E., Mount Diablo base and Meridian, 31.3 cubic feet of water per second with a priority of June 26, 1897, for delivering, after an allowed transportation loss of 20 per cent, 25 cubic feet of water per second to the wheel at the pumping and power plant of this company, situated in the SE 1/4 of the SE 1/4 of Section 33, in T. 21, N., R. 24 E., M.D.M., for the operation thereof and for pumping and for generating electrical and other power.

WADSWORTH WATER SUPPLY
(Solicitor: James T. Boyd)

Claim No. 14. In addition to the amount of water so allowed to be diverted for generating power, for pumping and the operation of its plant, the Wadsworth Light and Power Company is entitled and allowed to divert at all times from the Truckee River through its said power ditch, for supplying the Town of Wadsworth and the people living in or near this town with water for fire protection, for the irrigation of their lawns, gardens and lands, and for household and other purposes, 3.13 cubic feet of water per second with a priority of June 26, 1897, for the delivery, after an allowed transportation loss of 20 percent, of 2.5 cubic feet of water per second to the reservoir of said company in the SE 1/4 of the SE 1/4 of Section 33, in T. 21, N., R. 24, E., M.D.M., and to said people for said purposes. (See Irrigation Rights for irrigation water allowed under this ditch, No. 635.)

WINTER DITCH REGULATION

The owners and operators of ditches through which the diversion of water is allowed for generating electricity and power and for milling, mechanical and municipal purposes, and for supplying the inhabitants of any city or town, whenever ice shall collect in any of their ditches, shall be allowed to divert from the Truckee River and use such additional amount of water as may be required for flushing out such ice and so long only as may be required for such flushing, provided that the water diverted for such flushing

shall not in any case be more than 20 per cent of the amount which is fixed and allowed by this decree to be diverted through the ditch in which said flushing is done.

All water diverted or used for generating electricity or power or for operating mills or power plants shall be returned directly to the Truckee River after being so used, Extra water for preventing congestion by ice and for flushing ice allowed to be used in ditches supplying water for municipal purposes when required must be returned directly to the river when used for these purposes.

IRRIGATION RIGHTS

The parties, persons and corporations hereinafter named and their grantors and predecessors in interest have acquired rights of appropriation in, and have diverted and appropriated from the Truckee River and its tributaries and used for the necessary irritation of their respective hereinafter described lands, water in the respective amounts and under the respective priorities as stated in the following table. As shown by the following tabulations and columns, each of the parties, persons and corporations named in the columns headed, "Owner," directly or by his, her or its grantor or predecessor in interest, on and continuing after the date in the columns headed "Date of Priority" and opposite his, her or its name or described lands, from the stream last named above his, her or its name or in connection therewith, and through

the ditch or ditches named in the columns headed "Ditch" and opposite his, her or its name or described lands, for the necessary irrigation of his, her or its lands as described opposite his, her or its name and in the columns under the words, "a Acres Irrigated" and following columns, diverted and appropriated water in the amount or amounts stated opposite his, her or its name or described lands and in the columns, headed "Approximate Diversion," and water sufficient to deliver to his, her or its said lands after transportation loss, the amounts in flow and acre feet per season stated opposite his, her or its name or described lands and in the columns under the words "Amount Allowed Delivered to Land" :

COLUMNS OMITTED

GENERAL PROVISIONS

In the foregoing table and columns pertaining to irrigation water rights the word, "Direct," means that the acreages specified thereunder are irrigated by water hereby allowed to be diverted from the river, creek or stream last named above the acreage; the word, "Drain," means that the acreages thereunder are irrigated by drain or waste water hereby allowed and ordered for the irrigation thereof; the word, "Season," means the time in any calendar year when irrigation may be needed; the word, "Priority," means the time when the water right was initiated. "Inch" means one-fortieth (1/40th) of one cubic foot per second, which, in general is the amount of water

which will flow through an orifice having an area of one square inch, under a pressure of six (6) inches at the center of the opening. "Acre Foot," means the amount of water which will cover an area of one acre to a depth of one foot.

All of the above described ditches, lands and sections are in townships north and ranges east, Mount Diablo Base and Meridian. All of the irrigated lands are in the State of Nevada, except a part of the tracts listed under Dog, O'Neil, and Sunrise creeks. All of the ditches, canals and flumes are in the State of Nevada excepting the Farad and the upper end of the Fleish. Lake Tahoe is partly in Nevada and partly in California and the outlet of the lake to the Truckee River and the dam controlling the storage in the lake are in the State of California.

Without the application of water thereto the above described lands are dry and arid and irrigation is necessary for the production of valuable crops thereon. The respective amounts of water hereinbefore stated to have been appropriated for or used on these lands, are in each instance as specified therefore necessary and sufficient for the reasonable and economical irrigation of crops thereon other than grain, potatoes, corn and beets. These do not need to be irrigated for so many months as alfalfa and pasture. Only two-thirds of the amount of water in acre feet hereinbefore specified or allowed for the irrigation of any of the above described tracts of land is necessary for, or should be or is allowed for the irrigation of grain grown thereon. Only four-fifths of the

amount of water in acre feet designated above for the irrigation of said tracts of land is necessary for, or should be or is allowed for, the irrigation of potatoes, corn or beets grown or is allowed for, the irrigation of potatoes, corn or beets grown thereon. Young alfalfa needs frequent irrigations for a long season. An additional amount of ten per cent of the quantity of water hereinbefore specified in acre feet for the irrigation of any of the above described lands is necessary for and should be and is allowed for the irrigation thereof during the first year that alfalfa is sown thereon, whether the alfalfa be sown with o. [sic] without grain.

The amounts of water which the parties to this action have appropriated and used for purposes other than the irrigation as stated above are necessary and sufficient for the uses for which they have been appropriated.

The above named parties who so appropriated water for irrigation have also used and in addition thereto are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes; provided that the priority in respect of the use of water for livestock and domestic purposes of any person shall be identical with the priority of such party for irrigation.

IT IS FURTHER ORDERED AND DECREED that that certain agreement known as the Truckee River Agreement, dated July 1, 1935, entered into by

the United States of America, party of the first part, Truckee-Carson Irrigation District, party of the second part, Washoe County Water Conservation District, party of the third part, Sierra Pacific Power Company, party of the fourth part, and such other users of the waters of the Truckee River as may have or shall become parties to said agreement by signing their names thereto, parties of the fifth part, which agreement provides (among other things) for the upstream storage of the waters of the Truckee River and its tributaries, be and the same is hereby approved, adopted by the Court and made a part of the decree and shall be binding as between the signatory parties to said agreement.

Water for irrigation is allowed to be used at any time, provided that the amount applied to the land during any calendar year shall not exceed the quantity in acre feet allowed to the land.

No owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre feet hereby allowed for the land for the season.

If it shall appear at any time in regard to the actual use and need of water for irrigation that the amount hereinbefore estimated and allowed to be diverted from the river or stream into any ditch or canal is not sufficient after the transportation loss to deliver to the land the flow allowed by this decree for application to the land, the allowance or flow as fixed

by this decree for application to the land shall control, and there may, and hereby is allowed to be diverted from the stream a larger amount than the amount hereinbefore estimated for diversion from the stream, to the extent necessary to supply to the land, after actual transportation loss, the flow of water allowed by this decree for application to the land. Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed by this decree for application to the land and only the quantity needed for the irrigation thereof.

When any other user will thereby be deprived of any part of the water to which he is entitled, no ditch owner or user shall be allowed to divert away from the stream extra water for regulating the flow in any ditch.

The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks, or streams or other waters hereinbefore mentioned except the rights, specified, determined

and allowed by this decree, and each and all of said parties, persons, corporations, intervenors, agents, attorneys, servants, assigns and successors in interest; and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Truckee River or its tributaries or with water of any of the creeks or streams, of with any of the other waters hereinbefore mentioned, so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree, having due regard to the relative priorities herein set forth; and each of the said parties and persons and each of their agents, servants, attorneys and employees is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree, as herein set forth, until such persons or parties having prior rights have received for the several uses the waters hereby allowed and adjudged to them.

Except as herein specially provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water hereinbefore allowed

are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.

In any case where water is obtained from two or more sources, the aggregate amount of the combined waters from such sources which may be used, shall not exceed the amount required for such use as herein determined.

Whenever in this decree words of ownership are used in connection with any irrigated lands, such words shall not adjudicate, determine or affect any property rights therein, and this decree does not and shall not in any way determine the title to or rights in any property whatsoever, other than the rights to the diversion and use of water as herein determined and established. In the cases where, by this decree, water is allowed to be diverted through any ditch by the owner thereof for another party the conditions of any contractual relations existing between them are not hereby determined.

A Water Master shall be appointed by this Court to carry out and enforce the provisions of this decree and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Master, made in accordance with any for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch or canal owners or water users

so disobeying or disregarding such proper orders, rules or directions, and the Water Master shall promptly report to the Court his said action in such case and the circumstances connected therewith and leading thereto. Whenever the necessities of the situation appear to the Court to so require, the Court shall authorize the employment by the Water Master of such person or persons to assist the Water Master as the Court may deem necessary to properly carry out the provisions of this decree and the orders of the Court. The terms of employment, expenses and compensation of said Water Master and his assistants, the payment thereof and the means and methods for securing fund with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make. The compensation and expenses of the Water Master and his assistants shall be borne by the parties whose rights are adjudicated by this decree in the following manner, to-wit: One-third by the United States, one-third by the Sierra Pacific Power Company, and the remaining one-third by the remaining persons or corporations whose rights are adjudicated by this decree. Any person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises.

The owner or owners of each ditch or canal herein authorized to divert water from the Truckee

River or any of its tributaries, or from any ditch or canal or other waterway receiving water therefrom, shall, within sixty (60) days after the entry of this decree, or such lesser time as may be fixed by the Water Master, install and thereafter at all times properly maintain in such ditch, canal or other waterway, a reliable, sufficient and easily-operated regulating headgate and locking and measuring devise, to be approved by the Water Master, whereby the water diverted into such ditch, canal or other waterway at any and all times may be properly regulated and correctly measured.

The stored water of any reservoir, including Lake Tahoe, may be turned into and carried in the channel of any natural stream and mingled with the waters thereof and diverted therefrom for the proper uses of the persons or parties entitled thereof. The Water Master, upon timely notice, shall so regulate the headgates along the streams and do and direct to be done such other things as may be needful to transport such stored water and deliver the same to the person or persons entitled thereto. All persons are hereby prohibited from in any way interfering with any such stored water while the same is being legally carried to the persons or parties entitled thereto.

The quantities of water permissible to be diverted by the owners of the several ditches, through said ditches, on account of the several priorities herein decreed, are decreed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required

under a reasonable, economical and beneficial use. Rotation, or the combining and exchanging of the use of water between ditches and among users shall be permitted when necessary in order to obtain reasonable economy in the use of the water of the river or other streams, or in order to give each ditch or user a more advantageous irrigation head, provided that such rotations shall not injuriously affect any of the rights determined and allowed by this decree. The Water Master may arrange for such rotations and consult with and endeavor to obtain the agreements of the various water users thereto, as the occasion may require and shall promptly report to this Court his action in the premises.

All users of water allowed by this decree a flow of less than once inch per acre for his, her or their respective lands may, with the consent of the Water Master or by his direction to the owners or person in charge of the ditch through which the water is conveyed, use when needed for the irrigation of his, her or their land, a larger flow than specifically allowed by this decree, up to and not exceeding one inch per acre, provided the amount of water used during any calendar year shall not exceed the seasonal acre feet allowance for the land, and that the flow allowed would not, if continuous, deliver in any one month in excess of twenty-five (25) per cent of the seasonal allowance in acre feet heretofore in this decree specifically allowed for said lands.

Whenever any person or party shall not be receiving the amount of water to which he is entitled

under this Decree, the Water Master shall, upon request open, close, lock and regulate the necessary headgates, ditches and other works used for the diversion and application of such waters as to apportion the same as herein provided, and for that purpose may enter upon the lands of any and all persons having rights adjudicated by this Decree.

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.

The State of Nevada is not a party to this suit but the rights of the State to water through different ditches which divert from the Truckee River for the State and numerous parties to this action have been estimated for convenience and purposes of administration.

The several parties to this suit shall pay and bear their own costs.

Said Sierra Pacific Power Company is the identical party and corporation referred to herein and in the "Temporary Restraining Order" made and entered in said cause on February 13, 1926, as the "Truckee River General Electric Company, a corporation", the name of said corporation having been heretofore changed, pursuant to law, from the Truckee River

General Electric Company to Sierra Pacific Power Company.

The foregoing adjudications set forth in Claims Numbers 1 to 744, inclusive, of this Decree are based upon conditions existing at or prior to the entry of said Temporary Restraining Order herein on February 13, 1926; and such adjudication shall not be deemed to limit, reestablish, or otherwise affect any rights acquired, created or lost subsequently thereto by conveyance, transfer, abandonment, non-user, contract (including said Truckee River Agreement) or otherwise, but the rights of the United States shall be as herein adjudicated as of the date of this decree save only as the same may be affected by said Truckee River Agreement.

Done in open court this 8th day of September, 1944.

Frank H. Norcross,

District Judge.